Supreme Court United States.

OCTOBER TERM, 1872.

HORATIO J. OLCOTT,

PLAINTIFF IN ERROR,

vs.

THE COUNTY BOARD OF SUPERVISORS OF FOND DU LAC COUNTY.

No. 267.

BRIEF AND POINTS OF DEFENDANT IN ERROR.

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Supreme Court of the United States.

HORATIO J. OLCOTT, Plaintiff in Error,

vs.

THE COUNTY BOARD OF SUPERVISORS OF FOND DU LAC COUNTY, Defendant in Error.

ABSTRACT OF CASE.

This suit is brought by the plaintiff in error to recover of the defendant in error on one hundred and thirteen orders, purporting to be issued by the Board of Supervisors of Fond du Lac County, amounting in all to the sum of thirty thousand dollars, which orders are in the following form, differing only in number and amount:

"COUNTY ORDER.

"$100. No. 1.

"The Treasurer of Fond du Lac county, Wisconsin, will pay the Sheboygan and Fond du Lac R. R. Co. or bearer, one hundred dollars, one year after date, with interest at the rate of seven per cent. per annum. No interest allowed on this order after maturity, unless presented for payment.

"Given under my hand at Fond du Lac, this 15th day of February, A. D. 1869. E. H. GALLOWAY,

Chairman Co. Board Supervisors.

"Attest: C. H. DE GROAT, *Clerk.*"

These orders were issued under the following circumstances:

In 1867 the Legislature of the State of Wisconsin passed an act entitled "An act to authorize the county of Fond du Lac to aid the completion of the Sheboygan and Fond du Lac railroad, and to aid the building of a railroad from the city of Fond du Lac to the city of Ripon," approved April

10, 1867, and published April 26, 1867, as chapter 448, in private and local laws of 1867.

This act provides in substance as follows:

Sec. 1. That upon the presentation of a petition to the sheriff of the county, signed by not less than one hundred freeholders of the county, praying that the county of Fond du Lac aid in the completion of the Sheboygan and Fond du Lac Railroad, to the amount of ninety thousand dollars, accompanied with a request, signed by the president and secretary of said railroad company, that a vote be taken at a time and place named in such request, to decide whether said county will aid in the completion of said railroad. The sheriff should give notice of an election to be held at such time and place, which notice should be published not less than two weeks, in two newspapers published in said county.

Section 2 provides for the mode of conducting such election.

Section 3 provides, if a majority of the votes cast shall be for railroad aid, that whenever the said railroad is graded a certain distance, and that fact shall be made to appear by affidavit, the said railroad company shall have the right to demand and receive of said county, orders to the amount of $30,000 in the form as issued. That when said railroad was graded a certain other distance, said company should be entitled to demand and receive orders in the further sum of $30,000; and when said railroad shall have been fully completed, so as to permit the running of the cars over it to the city of Fond du Lac, the company should be entitled to demand and receive in orders the further sum of $30,000.

Section 4 relates wholly to aid in building a railroad from the city of Fond du Lac to Ripon, which is immaterial, as no orders were ever issued in aid of that portion of the railroad.

Section 5 provides that such county orders shall be conclusive evidence to establish the indebtedness of said county, according to the tenor of said orders respectively.

Section 6 provides that, if said county shall furnish the aid contemplated by this act, the said railroad company,

its successors and assigns, shall transport wheat upon said road upon the following terms for ten years: Wheat by the car load, from the city of Fond du Lac and from stations east thereof within the county of Fond du Lac, to the city of Sheboygan, at a price not exceeding five cents per bushel.

Section 7 provides, that the board of supervisors shall levy upon all the taxable property of said Fond du Lac county a tax sufficient to meet the payment of such orders as might be issued.

Section 8 provides, that unless the road should be completed and the orders demanded within two years from the time of such election, such vote should cease to be binding.

An election having been held and an affirmative vote taken, in May, 1868, before the railroad company was entitled to demand or receive any orders under said act, and before any had been issued, Warren Whiting, a citizen and tax-payer of Fond du Lac county, brought an action in the circuit court for Fond du Lac county, in his own behalf and in behalf of all others of like interest, to wit, all other tax-payers of said county, against the defendant in this suit and the Sheboygan and Fond du Lac Railroad Company, for the purpose of having said act of the Legislature adjudged unconstitutional and void, and to restrain by injunction the issuing of the county orders provided for by said act of the Legislature, and obtained in said action an injunction, restraining the Board of Supervisors from issuing and the railroad company from demanding or receiving any orders under said act, which suit was instituted before any orders were issued.

On the 12th day of November, 1868, the defendants made a motion to dissolve this temporary injunction, which motion was denied by the circuit court, and the defendants appealed from the decision, denying said motion, to the Supreme Court of the State.

On the 19th day of January, 1869, the action was tried and judgment was rendered for the defendants, and the

plaintiffs immediately appealed from said judgment to the Supreme Court of the State.

The orders on which this suit was brought were issued on the 15th day of February, 1869. At the June term, 1869, the Supreme Court of the State of Wisconsin decided that the said act of the Legislature is unconstitutional and void, affirming the decision of the circuit court in refusing to dissolve the injunction, and reversing the decision of the circuit court in favor of the defendants. A motion for a rehearing was made and argued, and final judgment given by the Supreme Court of the State, at the January term, 1870, in accordance with the decision announced at the June term, 1869, as above stated.

On the trial of this action in the circuit court of the United States for the eastern district of Wisconsin, on the 26th day of October, 1870, the plaintiff in error introduced the said act of the Legislature and said county orders in evidence, and rested his case, admitting that the orders in suit were only issued under authority of said act. (Case folio 42.) The defendants introduced no evidence, and the jury, under instructions from the court, rendered a verdict for the defendants, and judgment for costs was entered thereon.

I.

The questions involved in this action do not arise under the Constitution or laws of the United States, but under chapter 448 of the private and local laws of Wisconsin for the year 1867. The principal question is, whether the Legislature of the State of Wisconsin could pass a valid law authorizing the raising of the sum of $150,000 upon the taxable inhabitants of the county of Fond du Lac, for the purpose of donating the same to a *private* corporation, to wit, the Sheboygan and Fond du Lac Railroad Company? Or, in other words, the question is, whether the Legislature of that State had or has the power to authorize money to be taken from the *people*, by taxation, and given to the *stockholders* of a railroad company?

The Supreme Court of the State of Wisconsin, in *Whiting* v. *The Sheboygan and Fond du Lac Railroad Company*, (25 Wisconsin, 167,) held that the Legislature of that State had no such power, and that this chapter 448 was void, and that the orders sued on in the case at bar, issued under it, were issued without the authority of law, and were void and of no effect, and enjoined the county and its officers from raising, or attempting to raise, any tax to pay them.

This was the decision of that court after an elaborate argument of the question; and, on a motion for re-argument, the court adhered to its decision. The very point decided in that case is now again presented here.

It is the established doctrine of this court, that it will adopt and follow the decisions of the State courts in the construction of their own State constitutions, and statutes passed in pursuance of them, when that construction has been settled by the highest judicial tribunal of the State.

Nesmith *v.* Sheldon, 7 How., 812.
Webster *v.* Cooper, 14 How., 488.
State Bank of Ohio *v.* Knoop, 16 How., 369.
Amey *v.* Mayor of Allegheny City, 24 How., 364.
Mutual Assurance Society *v.* Watts, 1 Wheat., 279.
Ship *v.* Miller, 2 Wheat., 316.
Jackson *v.* Chew, 12 Wheat., 153.
Fullerton *v.* Bank of the United States, 1 Pet., 604.
Green *v.* Neal, 6 Pet., 291.
Rowan *v.* Runnels, 5 How., 139.
Beauregard *v.* The City of New Orleans, 18 How., 497.
Doswell *v.* De La Lanza, 20 How., 29.
Parker *v.* Kane, 22 How., 1.
League *v.* Egery, 24 How., 264.
Ex parte Robinson, 5 McLean, 355.
Elmendorf *v.* Taylor *et al.*, 10 Wheat., 152.

We are fully aware that it is claimed by the counsel for the appellant that the Supreme Court of Wisconsin has decided this question directly the reverse of the decision in

Whiting v. *The Sheboygan and Fond du Lac Railroad Company*, and that such decision was made anterior to that above named, and that such (prior) decision was the settled law of Wisconsin at the time these county orders in question were issued.

This is a mistake of the counsel, both in law and in fact.

The question whether money could be raised by taxation from the people, and *given* to a railroad corporation, or to its stockholders, was never presented to the Supreme Court of Wisconsin until this chapter 448 of the private and local laws of 1867 came before that court for review. This species of legislation was never before resorted to, and has never been since, in that State.

This claim of the counsel is founded principally upon three classes of decisions by the Supreme Court of that State.

First. Those where the court held that private property might be appropriated to create a water power for milling purposes, under the exercise of the power of *eminent domain* by the Legislature, just compensation being made the owner, as in—

Newcomb *v.* Smith, 1 Chandler, 71.
Thien *v.* Voegtlander, 3 Wis., 461.
Pratt *v.* Brown, 3 Wis., 603.

And also similar decisions, where the court held that by the exercise of this same power the lands of private persons might be taken by a railroad corporation for the construction of its road-bed, or right of way, as in—

Robbins *v.* Milw. & Horicon R. R. Co., 6 Wis., 636.
Shepherdson *v.* Milw. & Bel. R. R. Co., *et al.*, *id.*, 605.

All of these decisions rest upon an entirely different principle than that of Whiting *v.* The Sheboygan and Fond du Lac R. R. Co.

The distinction between the cases and the principles upon

which they are founded are very plain, and quite apparent "at the first blush."

In the cases where private property is taken for the purpose of creating a water-power, as for right of way of a railroad corporation, although in one sense it is an appropriation of the property to a *public use*, and could not be taken but for its appropriation to such use; and although the owner of such private property, as one of the public, may be indirectly benefited by its appropriation to such purpose, still it cannot be taken from him until he receives "*a just compensation*" for it in *money*.

It will hardly be contended, that by the exercise of this great power of *eminent domain* the money of the citizen could be taken either to build a mill-dam, or to purchase the right of way for a railroad company. For however great the necessity for such appropriation by the mill-owner, or the company, and however clearly apparent the *public use* might be, still the owner must receive in money the same amount of money taken from him, or he would not receive "a just compensation," and that, too, though he was indirectly greatly benefited by the building of the mill-dam or the construction of the railroad.

Second. The next class of decisions from which this claim is made are those in which the court have held, that it is competent for a State Legislature to authorize municipal corporations to raise money by taxation for the payment of bounties to volunteers who may enlist into the military service of the United States under an act of Congress and a call of the President of the United States, and may be credited to such town, city, or village upon its quota under such call, as in Brodhead *et al. v.* The City of Milwaukee *et al.*, (19 Wis., 694;) or, to build a breakwater to protect the public streets and private property of a city from the encroachments of Lake Michigan, as in Soens *et al. v.* The City of Racine, (10 Wis., 271;) or, for the building of a public harbor, as in Hasbrouck *v.* The City of Milwaukee, (13 Wis., 37.)

These cases are so clearly distinguishable from the one

under consideration, that it is quite remarkable that any able lawyers like the counsel opposed should think there was any similarity between them. They were all cases of taxation, for the direct and immediate benefit of the public. In Brodhead against Milwaukee, the tax was raised to secure soldiers to protect and defend the Government of the United States against a formidable rebellion. This was an object of the greatest possible public concern. To save and protect a government from destruction in time of war has ever been regarded one of the very highest and most sacred duties which the citizen owed the State.

No person or corporation creates, manages, owns, or takes stock in a *war*. It is a thing in which men do not gamble, as they do with railroad bonds and stocks in the market. Rebellion and war are not private, but very public matters. And raising money by taxation to suppress a rebellion, or carry on a war, is as different from raising it to donate to a railroad company as daylight from darkness, truth from falsehood, or good from evil. And it would seem almost impossible for any one, however acute, to detect the slightest similarity between them, much less to show them to be alike in principle.

The same suggestions may, with equal propriety, be made in reference to Soens *v.* Racine, and Hasbrouck *v.* Milwaukee. No private corporation had any direct pecuniary interest in either improvement. The citizens of the city of Racine, in their municipal capacity, owned the breakwater which they taxed themselves to erect. And the money they raised and used in its erection was not only raised for a *public* use, but the city alone owned the improvement when completed. And so did the city of Milwaukee own the harbor they taxed themselves to improve. And it is the direct interest which these cities had in these public improvements which the court held would justify and uphold a law authoizing a tax to pay for them. And Chief Justice DIXON, in delivering the opinion in Whiting *v.* The Sheboygan and Fond du Lac Railroad Company, says: "And, first, as to 'the cases in this court, from the opinions in which counsel

'quote so largely, and upon which they rely so confidently,
'it seems hardly necessary to add to our former remarks.
'Those cases are as clearly distinguishable from this as ever
'one case was from another. They were all cases of taxa-
'tion for the direct and immediate benefit of the public:
'to improve a harbor, which was public property; to
'save from destruction the streets and site of a populous
'town, also public property; and to secure soldiers to pro-
'tect and defend the country in time of war, always recog-
'nized as a public object of the greatest magnitude and im-
'portance. With these objects in view, it seems very strange
'that the laguage of the court should be severed entirely
'from the facts of the case before it, and the attempt be
'made to apply it to a wholly different state of facts, when
'the object of the tax is to promote strictly individual, and
'to add to or enhance the value of merely private, property.

"And particularly does this seem strange, when the power
'to tax for any private purpose was expressly denied in the
'opinions. Such mode of interpreting and applying judi-
'cial opinions is well known to be unauthorized. It is a
'mode of misconstruing them, against which, when counsel
'are so disposed, it is impossible for the court to guard or
'protect itself. When, therefore, it was said in those cases,
'that any the slightest public interest or benefit would
'sustain a tax, such statement is to be considered in con-
'nection with the facts of the case upon which it was made;
'and when it appears, from these facts, that the interest or
'benefit spoken of was the direct and immediate interest or
'benefit of the public to be promoted by the work, and not
'such as would incidentally or remotely accrue to the com-
'munity at large from the accomplishment of it, it is to such
'direct and immediate public benefit and interest that the
'statement is to be applied, as much as if it had been ex-
'pressly so limited. This is a familiar rule of construction,
'and one which cannot be departed from by counsel with
'safety to suitors or with justice to the court. It is a rule
'which excludes all such unfounded inferences as that at-
'tempted to be drawn here. The court, in those cases, being

'called upon to define what direct and immediate public in-
'terest or benefit would sustain a tax, did so in the language
'quoted. The question whether a public benefit or interest
'of some other or different kind, as that which is indirect or
'incidental to the prosecution of some enterprise or business
'of a private character, would sustain a tax, was not then
'before the court, nor was the court required to consider it,
'or to expressly qualify its language with reference to it.

"The language of the opinions, and every word in them,
'stand qualified and limited by the proper subject-matter
'of the cases under consideration, and, thus understood, we
'have nothing to add to or take from them, and acknowl-
'edge our obligations when the learned counsel commend
'them as perfectly sound expositions of the law

"We, too, believe them to be correct, and not in the
'smallest degree inconsistent with what has been here
'decided."

The counsel for the appellant further says, that the Supreme Court of Wisconsin, having upheld the condemnation of land by a railroad for its right of way by the right of eminent domain, on the ground that it is taken for a *public use;* and that the same court having further held, in the cases above alluded to, that taxation may be authorized for any object in which the public have the *least possible interest;* that therefore it follows, as a logical result from these decisions, that money may be raised by taxation and given to a railroad company to be used for any purpose the company may see fit to apply it to. He further argues, that such company may condemn and take by right of eminent domain any kind of property it may desire to use, and then tax the people to raise sufficient money to pay for the property so condemned and taken. This doctrine proves too much. The right of way of a company is no more devoted to the *public use* than its engines, rails, ties, buildings, carts, drays, and other personal property it possesses. Its engines and all its other property are devoted to the public use, as much as the land taken for right of way. And yet the Supreme Court of Vermont, in Eldridge *v.* Smith, (34

Verm., 484,) say: "That a railroad company could not 'take land by right of eminent domain for the purpose of 'locating upon it an establishment for the manufacture of 'cars. It was argued by the counsel for the road, that there 'was a public necessity for this; that it was as much a pub-'lic necessity for the company to have cars as a right of 'way. But the court say, that it was also necessary for the 'company to have wood, timber, iron, ties, nails, sash, and 'glass, &c., but that these things could never be taken by 'right of eminent domain, though taken for *public use* and 'full compensation is made. That it was not within the 'power of legislation to grant any such right. That if the 'corporation want these things, they must purchase them 'as ordinary individuals do."

And in West River Bridge Co. *v.* Dix, (6 How., 545, 546.) This court, in speaking of this question, say: "When we 'go to other *public uses* not so urgent, not connected with 'precise localities, not so difficult to be provided for with-'out the power of eminent domain, and in places where it 'would only be *convenient*, but not *necessary*, I entertain 'strong doubts of its applicability. Who ever heard of 'laws to condemn private property for public use for a ma-'rine hospital or State prison? So a custom-house is a pub-'lic use for the general Government, and a court-house or 'jail for a State. But it would be difficult to find *precedent* 'or *argument* to justify taking private property, without 'consent, to erect them on, though appropriate for that 'purpose. No *necessity* seems to exist which is sufficient 'to justify so strong a measure. I am aware of no prece-'dents for such seizures of private property abroad for ob-'jects like the former, though such doctrines appear to have 'been advanced in this country.

"Again, many things belonging to bridges, turnpikes, and 'railroads, owned by corporations, *public for some purposes*, 'are not, like the land on which they rest, local, peculiar, 'and *public*, in the *necessity* to obtain them by the power of 'eminent domain.

"Such seem to be *cars*, *engines*, &c., if not the timber for

'rails, and the rails themselves, (citing Gordon *v.* C. & J. 'Railway Co., 2 Railway Cases, 807.)

"Such things do not seem to come within the *public ex-* '*igency* connected with the roads which justifies the appli- 'cation of the principle of eminent domain. Nor does 'even the path for the road, the easement itself, if the use 'of it be not public, but merely for particular individuals, 'and merely in *some degree beneficial to the public.* * * * *

"In the present instance, however, the use was to be for 'the whole community, and not a corporation of any kind. 'The property was taken to make a free road for the people 'of the State to use, and where there had been tolls before 'for *private profit*, and by a *private corporation*, so far as 'regards the interest in its *tolls and property.*"

These authorities draw a distinction which the counsel opposed seem to overlook or undervalue, because he asserts, in substance, that the Legislature, in the exercise of the power of *eminent domain*, may authorize a railroad company to seize any species of property it may have occasion to use, belonging to a citizen, and appropriate to its use, upon making him full compensation, and then levy a tax upon all the people, including the citizen, to pay for it, and it may happen that the tax, the citizen thus stripped of his property would have to pay, would be greater than the value of the property, this would be worse than keeping the word of promise to the ear and breaking it to the hope.

This is taking a man's property under the pretense of taking it for *public use*, upon making him a compensation for it, but making the same man *raise the money with which he is to be compensated. Or, in other words, he would be compelled to pay the company for robbing him of his property.*

If such unjust proceedings can be upheld; if the people can thus be fleeced in the interest of these constantly increasing railroad monopolies, then the tenure by which the citizen holds his estate is more uncertain and precarious in this country than under the despotic governments of the old world, where, as this court says in the case above quoted from, such proceedings are unknown. Such proceedings,

provided they could be sustained, would deserve the opprobrious language given to them by Judge JAMES, in Sweet *v.* Hurlbert, (51 Barb., 316,) where, speaking of an act of the Legislature, precisely in principle like the one called in question here, he says: "If this can be done, it is legal rob-'bery; less respectable than highway robbery in this, that 'the perpetrator of the latter assumed the danger and in-'famy of the act, while this has the shield of legislative 'irresponsibility."

This is extending the doctrine of eminent domain and taxation to objects and purposes to which they have never before been applied. For we know of no instance in this or any other country where a railroad company has attempted to condemn personal property, such as lumber, nails, glass, horses, engines, &c., by the power of eminent domain. Or where it has been permitted to resort to *taxation* to raise money to pay for this species of property.

If it wants these things, it must purchase them with its own money. And there is no more reason or justice in taxing the people for this purpose than there would be in taxing them to raise money to pay a judgment against such company for negligence in breaking an arm or leg. Would such a judgment be a *public burden*, which the people of a county or town could be made to pay, because the company had a road through such county or town?

If such a power of taxation is once admitted in favor of private corporations, then it will follow that there are other private business pursuits for the benefit of which taxes may be levied. Land may be condemned by the power of eminent domain to create *a water power*, on the ground that it is taken for *public use*. But can taxation be resorted to for the purpose of raising means for the owner of such power to build and furnish his mill with the requisite machinery, under the guise of raising money for *public use?*

That it cannot be done, we must content ourselves by calling attention to the very able and conclusive argument of Chief Justice DIXON, in Whiting *v.* The Railroad Company.

His argument has never been answered, and is, in fact, unanswerable.

Third. The third and last class of decisions, from which it is claimed the law of this case is settled against the defendant by the Supreme Court of Wisconsin, are those where laws have been upheld, authorizing cities and towns to subscribe to the capital stock of railway companies, and pay such subscriptions by their bonds, as in

Clark *v.* The City of Janesville, 10 Wis., 136, and
Bushnell *v.* Beloit, 10 Wis., 195.

Both the justice and the legality of permitting municipal corporations to engage in making railroads, have been seriously questioned by some of the ablest jurists in this country; and when this power has been sustained, it has generally been by a divided court. In Sharpless *v.* The Mayor of Philadelphia, &c., (21 Penn., 158,) a leading case upon this point, LEWIS and LOWRIE delivered dissenting opinions.

And Justice COLE, in Bushnell *v.* Beloit, says: "It is 'insisted, not without *force* of *reasoning*, that municipal 'corporations *are created for no such purpose.*"

And REDFIELD, one of the ablest law writers in the United States upon this subject, says in his work on the Law of Railways, vol. 2, p. 398, note 2:

"But, in regard to the power of the Legislature to em-'power municipal corporations to subscribe for stock there 'has been more controversy. The dissenting opinions of 'some of the judges, upon the question, where the majority 'of the court have maintained the validity of such sub-'scriptions, would appear to have the *advantage* of the *ar-'gument*, especially where it has been attempted to impose 'a burden upon municipal corporations for the erection of 'railways beyond their territorial limits, although inci-'dentally affecting their pecuniary interests, by way of 'business. The fallacy of the argument by which the pre-'vailing opinions have been attempted to be maintained, if

'there be any, seems to consist in assuming that corporate 'interests of municipal corporations extend to everything 'affecting their general wealth and business prosperity, 'whereas in *truth* we are compelled to limit such interests 'at a point *far short of this*.

"Everything which is practically indispensable to the 'security of life and property, or to the successful pursuit 'of business and to the furtherance of *public* improvement 'and enterprise, is, undoubtedly, to be fairly regarded as of 'municipal interest and concern.

"But when we go beyond this, and include every improve-'ment and public enterprise which centers in such munici-'pality, there seems to be serious difficulty in fixing any 'just limit to the public burden which such corporations 'shall impose upon its members by the consent of the Leg-'islature, which is ordinarily no sure barrier against unjust 'taxation for the fostering and supporting of public works, 'in which the majority of the citizens of a district may 'already be embarked. These and similar questions have 'with us created such distrust of the *justice* and *legality* of 'these municipal subscriptions for railway stock, that if the 'question were altogether new, we should entertain *great* '*doubts* and serious hesitation in regard to the practice 'coming appropriately within the range of municipal powers 'and duties. It seems to us, that if these public works re-'quire public patronage, it would more appropriately come 'from the State than from the municipalities, which are 'created for limited purposes, and with no appropriate fa-'cilities for the management of pecuniary investments in 'such extended enterprises."

And he again says, in vol. 2, page 396, note 1: "For 'ourselves, we are free to confess that we never could com-'prehend the basis upon which so many able jurists in this 'country have professed to perceive clearly the reasons for 'giving municipal corporations the power to become stock-'holders in railway companies. We have always felt that 'it was one of those cases in jurisprudence where the *wish* 'was *father* to the thought."

As above suggested, we cite these views of this eminent jurist, not for the purpose of overturning the doctrine that a county may subscribe stock in a railroad company, but with the intent to show how one of the ablest writers on the subject regarded even this power, and to show that if it were a new question, his decision beyond question would be against the power.

We do not question the power of a county or town, when authorized to take stock, issue its bonds, and tax its inhabitants to raise money to pay them. In such cases the county or town becomes a stockholder, and owns an interest in the corporate property in the ratio of the stock owned. And when a tax is raised to pay for such stock or take up a bond, the county or town is raising money to pay its *own debt*.

The Supreme Court of Wisconsin was asked to go further, and to hold that counties and towns might be taxed to pay for the *stock subscribed for by others*. It declined to take this step, and held, that it was unlawful to tax the people for this purpose. And this appeal is brought to have this court *reverse* that decision. See on this point the very able opinion of Chief Justice DIXON in—

Curtis *v.* Whipple, 24 Wis., 350.
Sweet *v.* Hulbert, 51 Barb., 316.
People ex rel. Howell *v.* Town Board, (20 Mich., 452.)

Fourth. Although the constitutions of all the States contain limitations upon legislative power for the protection of private rights, yet these constitutions do not point out which department of the governments should afford relief against unconstitutional legislation.

But all departments have settled down upon the judicial department as the proper one to give relief against such legislation.

Sedgwick on Statute and Constitutional Law, 477 to 487.
Concord Railroad *v.* Greeley, 17 N. H., 47.

Chief Justice BIGELOW, in Freeland *v.* Hastings, (10 Allen, 575,) says: "It is the *clear right* of every citizen to 'insist that no unlawful or unauthorized exaction shall be 'made upon him under the guise of taxation. If any such 'illegal encroachment is attempted, he can always invoke 'the aid of the judicial tribunals for his protection, and pre-'vent his money or other property from being taken and 'appropriated for a purpose and in a manner not author-'ized by the constitution and laws."

See also Phila. Association, &c. *v.* Wood, 39 Penn. St. R., 82.

Tyson *v.* School Directors, 51 Penn. St. R., 9.

Hammett *v.* The City of Philadelphia, American Law Register for July, 1869, p. 411.

II.

The act of the Wisconsin Legislature is void under Sec. 1, art. 8, of the Wisconsin constitution, which is as follows: "*The rule of taxation shall be uniform, and taxes shall be levied upon such property as the Legislature shall prescribe,*" on the ground that the taxation provided for in that act is not "uniform."

This question, though raised in the Supreme Court of Wisconsin, (Whiting *v.* The Sheboygan and Fond du Lac Railroad Company,) was not passed upon, as the decision was upon the broad ground, that the imposition of a tax, under that law, was not an exercise of the taxing power. (25 Wis. Rep., 167.)

Let us look at some of the decisions of the Wisconsin Supreme Court on the subject of "uniformity" in taxation:

Knowlton *v.* Supervisors of Rock County, (9 Wis., 410,) decides that, "The constitution has fixed one unbending, 'uniform rule of taxation for the State, and property can-'not be classified and taxed as classed by different rules."

"The constitution of this State requires, as a rule in levy-'ing taxes, that the valuation must be uniform, and the 'rate uniform, *or in all cases alike,* OR EQUAL, OPERATING

'ALIKE *upon all the taxable property throughout the territo-*
'*rial limits of the State, or municipality within or for which*
'*the tax is to be raised;* and where the Legislature prescribed
'a different rule, the act is a departure from the constitu-
'tion, and therefore void."

This last case is considered and approved in Weeks *v.* The City of Milwaukee, (10 Wis. Rep., 242.) This last case decides that, "The constitutional provision, 'that the rule 'of taxation shall be uniform,' extends to all taxation by 'cities, towns, and counties, in their exercise of the taxing 'power delegated to them by the State. The object of this 'provision was to protect the citizen against *unequal* and 'unjust taxation."

In Lumsden *v.* Cross, (10 Wis., 282,) the court say: "All 'taxes levied for the purpose of revenue, and for the sup-'port of the Government, as well for the expenses of muni-'cipal corporations as for the State at large, must be levied 'in accordance with the uniform rule prescribed by sec. 1, 'art. 8, of the Constitution," and the case of Knowlton *v.* Supervisors, before cited, is again approved; and again in The Attorney General *v.* The Winnebago Lake and Fox River Plank-road Company, argued afterwards and reported in 11 Wis., 35. This case was afterwards overruled and a former decision followed, on the ground that, if sustained, it would overturn the whole taxation of the State; and an exception was, therefore, made in support of a law providing that rail and plank-road companies should pay a percentage upon their gross earnings, in lieu of taxation on their assessable valuation.

The case of Knowlton *v.* Supervisors was again brought on appeal to the Supreme Court, "to ascertain whether the recent decision, granting a motion for rehearing in Kneeland *v.* The City of Milwaukee, was intended to overrule or in any way affect the former decision." The court say: "We can only say that it was not. That motion was granted upon the ground that there had been a former decision of this court sustaining the very law in question, (the law for payment of a percentage on the gross earnings of

rail and plank-roads,) which we did not feel at liberty to overturn, after it had been so long acted upon—*that we shall follow that decision no further than the exact point decided*, that is, to sustain the validity of the act of 1854 taxing rail or plank-roads."

An act requiring banks to pay one and one-half per cent. on their capital stock, was held constitutional only on the ground that it had been ratified by the people under a reserved right of all legislative power on the subject of banks and banking, *including the mode of taxing them.* (Reedsburg Bank *v.* Hastings, 12 Wis., 47.)

The foregoing cases show with what pertinacity the Supreme Court of Wisconsin has adhered to the constitutional provision requiring uniformity of taxation.

Let us now consider chapter 448, private and local laws of Wisconsin, passed in 1867, the act under which the county orders in question were issued.

That act (without using its precise language) provided for a rebate of taxation, or a privilege and consideration for the benefit of a certain class of persons who might do business over the Sheboygan railroad. It contracted that that class of persons should have a certain rate of tariffs for their business. It was an inducement offered to that large class of farmers by which to carry the vote provided for by the act. It was because they must be influenced by considerations that should operate upon their minds when the day of election came. If they would vote for the tax, they should be compensated by the transportation of their wheat at a rate far below the ordinary price. It was to be for them a tax at the uniform rate which the property of others should pay, *except* that they should have as a class certain advantages not offered or secured to others. The tax, therefore, while apparently uniform, was absolutely unequal. It does not come within the decision cited, that "the valuation must be uniform and the rate uniform, or *in all cases alike or equal, operating alike upon all the taxable property*," &c.

There is not that *equality*, any more than if there had been a direct abatement of a portion of the tax from that

class of persons referred to. Suppose the language of the act had been, "all persons paying taxes under this act, and who raise wheat, or traffic therein, shall have a deduction of one per cent. of their tax," would the inequality be any the less because such persons were first required to pay the full tax, and take their deduction or allowance afterwards? It would be equivalent to saying, a certain percentage shall be allowed to all such classes of persons as shall have wheat transported over the road, to be allowed on payment of their tax.

Again, it is immaterial whether the price of transportation is *more* than a fair price; because, in that case, that class of persons would have the right to complain that the tax was unequal and unfavorable to *them*. The discrimination constitutes the inequality of the rule.

It cannot be said that the price fixed is the exact compensation to which the railroad company would be entitled, except for the law. Had it been, there would have been no necessity or propriety in putting this provision in the law. It must be supposed that it was inserted for a purpose; that it was intended to have some effect, to be of some value. *That is well understood, when it is known, as the fact is, that the price named is less than half the usual compensation paid for the same service.*

It was not a higher rate than was reasonable, because such a provision would not have received the assent of the people, and would not be expected so to do; the farmer, or wheat buyer, would not vote for it, and no one else within the county would have any interest to vote for it. It was incorporated in the law simply *because it was an inducement* held out to the farmer and shipper of wheat; it was an *advantage* to him; he could pay his tax with less burden than the merchant who should transport goods, the shipper of any other article of trade, or the person who simply traveled over the road without any rebate or discount on his fare.

With these suggestions, we think it not necessary to elaborate upon this point.

III.

There is a well-defined and substantial distinction between the question involved in the case at bar and the numerous decisions in the State courts, which hold that municipal corporations, if duly authorized by the Legislature, may subscribe for the stock of a railroad, issue bonds to pay for it, and provide for the payment of the bonds by taxation. That is altogether a different matter from municipal corporations issuing bonds to railroad companies as a *donation or gift*, and raising money by taxation to pay such bonds. This is no more nor less than transferring the money of the taxpayers to a private corporation without consideration or equivalent. The question in the case of subscribing for stock is, whether purchasing stock in a railroad company is so far a municipal purpose, that the Legislature may authorize a municipal corporation to apply money raised by taxation to that purpose; while in the case of a donation or gift of the money thus raised, the question involved is the power of the Legislature to transfer the property of the taxpayer to private corporations, or, in other words, to private individuals who own the capital stock of such private corporations.

It is true there is no express prohibition in the constitution of the State of Wisconsin of the power to raise money by taxation to be donated to private individuals or private corporations, but the invalidity of such laws rests upon the same principle as the invalidity of laws which attempt to transfer the property of one individual to another. Courts have uniformly held the latter class of laws to be void; and with the same uniformity courts have decided that Legislatures possess no power to impose taxes for private purposes.

In the leading case of Sharpless *vs.* The Mayor, &c., (21 Penn. State, 167,) deciding that municipal corporations may be authorized to subscribe for the stock of railroad companies, Black, C. J., says:

"The Legislature has no constitutional right to create a 'debt, or levy a tax, or to authorize any municipal corpora-

'tion to do it—to raise funds for mere private purposes. This 'would not be legislation. Taxation is a mode of raising 'revenue for public purposes. When prostituted to objects 'in no way connected with the public interests, it ceases to 'be taxation and becomes plunder. Transferring money from 'the owners of it into the possession of those having no title 'to it, though it be done under the name and form of a tax, 'is unconstitutional, for all the reasons which forbid the 'Legislature to usurp any other power not granted to 'them."

In "The Matter of the Mayor," &c., (11 Johns., 80,) the Supreme Court of New York say, "Taxes mean burdens, 'charges, or impositions, put or set upon persons or property 'for public uses." And this is the definition which Lord Coke gives—tallage, (2 Inst., 523.) And Lord Holt, in Carthew, (1 K. B., 438,) gives the same definition in substance to *tax*.

In Booth *v.* Town of Woodbury, (5 Am. Law Reg.,) the Supreme Court of Connecticut say, "Taxation exacts money 'from individuals as their share of a justly imposed and ap-'portioned general public burden, and the equivalent is 'presumptively received in the benefits conferred by the 'Government."

In Philadelphia Association, &c., *v.* Wood, (39 Penn., 82,) the court say: "A tax is an imposition for the supply of the 'public treasury, and not for the supply of private individ-'uals or private corporations, however benevolent they may 'be. Tax legislation means the making of laws that are to 'furnish the measure of every man's duty in support of the 'public burdens."

In Tyson *v.* School Directors the same court say: "An 'unlimited power to make any and every thing lawful, 'which the Legislature might see fit to call taxation, would 'be, when plainly stated, an unlimited power to plunder the 'citizen."

In Knowlton *v.* Supervisors of Rock County, (9 Wis., 418,) the Supreme Court of Wisconsin say: "Taxes are 'defined to be rates or sums of money assessed upon the per-

'sons or property of citizens by governments for the use of 'the Nation or State.'' And again: "That they are burdens 'or charges imposed by the legislative power of a State upon 'persons for public purposes.'' And in Brodhead *v.* Milwaukee, (19 Wis., 652,) the same court say: "The Legis-'lature cannot create a debt, or levy a tax, or authorize a 'municipal corporation to do so, in order to raise money for 'a mere private purpose.''

Many other authorities might be cited on the question, all holding that legislatures possess only the constitutional power to impose taxes for public purposes; that laws which attempt to lay taxes for private purposes are unconstitutional and void.

The question is then presented, whether raising money by taxation, and giving it to a railroad company, is applying it to a public purpose or use within the meaning of those terms, as applied to the subject of taxation.

That a railroad company is a private corporation there can be no doubt. This is settled by an almost unbroken current of judicial decisions, and also by all elementary writers of repute. Kent says: "Civil corporations are es-'tablished for a variety of purposes, and they are either '*public* or *private*. *Public* corporations are such as are cre-'ated by the government for political purposes—as counties, 'cities, towns, and villages; they are invested with subor-'dinate legislative powers, to be exercised for local purposes 'connected with the public good, subject to the control of 'the Legislature of the State.

"They may also be empowered to take or hold private 'property for municipal uses, and such property is invested 'with the *security of other private rights*. So corporate fran-'chises, attached to public corporations, are legal estates cou-'pled with an interest, and are protected as private property.

"If the foundation be private, the corporation is private, 'however extensive the uses may be to which it is devoted 'by the founder, or the nature of the institution. A bank 'created by a government for its own uses, and where the '*stock* is *exclusively owned* by the government, is a *public*

'corporation. So, a hospital created and endowed by the 'government for general purposes, is a *public* and not a 'private charity. But a bank whose stock is owned by pri- 'vate persons is a private corporation, though its object and 'operations partake of a public nature. The same thing 'may be said of insurance, canal, bridge, turnpike, and *rail- 'way companies*. The uses may, in a certain sense, be called 'public, but the corporations are *private*, equally as if the 'franchises were vested in a single person." (2 Kent, 275.)

Redfield says: "Railways in this country, although com- 'mon carriers of freight and passengers, and in some sense 'regarded as public works, are ordinarily private corpora- 'tions. By private corporations, nothing more is meant 'than that the stock is owned by private persons.

"If the stock is owned exclusively by the State, the cor- 'poration is a public one. The American cases going to 'show that railways are private corporations are numerous.

"It does not alter the character of a private corporation 'that the State or United States own a portion of the stock. 'But a turnpike company or other corporation, managed 'exclusively by State officers, and at the *expense and for the 'benefit* of the State at large, is a public corporation." (1 Redfield on Railways, 53, 54, 55.)

Angell & Ames on Corporations, speaking upon the same subject, say, (sec. 30:) "*Public* corporations are towns, 'cities, counties, parishes, existing for public purposes. Pri- 'vate corporations are for banks, insurance, roads, canals, 'bridges, &c., where the stock is owned by individuals, but 'their use may be public. In all the last-named cases, and 'other like corporations, the acts done by them are done 'with a view to *their own interest*, and if thereby they inci- 'dentally promote that of the public, it cannot reasonably 'be supposed they do it from any spirit of liberality they 'have beyond that of their fellow-citizens. Both the prop- 'erty and the *sole object of every such corporation is essen- 'tially private*, and from them the individuals composing 'the company corporate are to derive a profit."

They can, therefore, only be public so far as they furnish

facilities for the public to transact business; but this is a kind of public use or purpose which is subserved by every business enterprise, whether carried on by a corporation or an individual; and here is seen the error into which the learned counsel opposed has fallen, in attempting to show that the decisions of the Supreme Court of our State are in conflict upon the question of what public purpose will support a tax. He cites Brodhead *v.* Milwaukee, (19 Wis., 652,) and other cases, in which the court has declared that the least possible public interest in the objects for which taxation is resorted to will support a tax—then arguing that there is a large public benefit derived from the construction and operation of a railroad. The mistake he makes is in looking at the degree, and not at the nature of the benefit which the public derives from such object. If the enterprise is of a public nature, it will support a tax without regard to the extent of the benefit conferred upon the public. Courts have no power to inquire whether the public purpose for which the tax is imposed is of sufficient importance to justify taxation or not: that is a question exclusively for the Legislature. While, on the other hand, if the object for which the tax is raised is not public in its nature, the law imposing it is not within the legislative power, and is void. The public must have a direct interest in the enterprise which is to be promoted or the work to be constructed with the money raised, or it is not of a public character. No incidental public benefit will attach the character of a public purpose or use to the work. If this were not so, there would be an unlimited power existing in legislatures to raise money by taxation for the purpose of donating it to individuals and private corporations. Incidental benefits arise from every business enterprise. Banks, stores, stages, horse railroads, hotels, omnibuses, business blocks of buildings, all tend to the benefit of the public: in other words, to benefit the people who are accommodated by them. And hence, if an incidental public purpose or benefit will support taxation, taxes may be raised to promote all these objects, which is simply absurd.

The learned counsel opposed states it as a proposition of law, that "where a citizen of New York enters into a contract with a citizen of Wisconsin, all the laws of either State which can affect the contract must be deeemed to have been in the minds of the contracting parties, and the contract must be presumed to have been entered into with a full knowledge of the effect of such laws upon the contract." And, although it is conceded that the contracts which we are considering here were made between citizens of Wisconsin, there is much reasoning in the counsel's brief, based upon the assumption that a contract between citizens of different States is under the special protection of this court, and especially subject to its determination, as to what the true construction or true rule of constitutional law, as applied to such contracts, is, excluding wholly from the consideration the rules of construction or of constitutional law as adjudged by the State courts.

That whole line of argument is calculated to lead the court away from the consideration of the real case in hand. The contract sought to be enforced in this suit is wholly a local contract, made between citizens of the State of Wisconsin: that is, between a municipal corporation and a private corporation, created by the laws of that State, deriving their whole power to contract, as well as their existence, from those laws. The orders sued on were issued by the county of Fond du Lac to the Sheboygan and Fond du Lac Railroad Company. Their validity and the rights of the parties under them depend wholly upon the constitution and laws of the State of Wisconsin. The fact that the plaintiff is a citizen of the State of New York does not in any way impair the force of this statement. He purchased the orders with full knowledge of the fact that they were issued by a municipal corporation to a private corporation, both of which were created by the laws of Wisconsin; and their validity depended wholly upon the power which had been conferred upon the county of Fond du Lac by those laws. (Marsh *v.* Town of Fulton, 10 Wall., —.)

Not only did the plaintiff purchase with a knowledge that the orders must depend for their validity upon the laws of Wisconsin, but he purchased *pendente lite*, with notice that the case of Whiting *v.* S. & F. du L. R. R. Co., was then being prosecuted in the courts of Wisconsin, in which the precise question in litigation was, whether the act of the Legislature under which the orders purchased by the plaintiff were issued was constitutional and valid. Had the plaintiff, pending the negotiation for the purchase of these orders, been on the ground, with his lawyers, as the learned counsel supposes, they would doubtless have advised him that, inasmuch as the orders were contracts made in Wisconsin, their validity depended upon the decisions of the courts of that State; and also, inasmuch as there was then pending in the courts of that State an action in which that very question was being tried, no prudent man would purchase the orders until that case was decided, unless he was disposed to make a gambling investment, and could purhase them for a mere trifle; that, at all events, he would take them at the risk of having them declared void in that case.

In Story's Eq. Juris., § 405, the rule of notice to a purchaser *pendente lite* is stated as follows. After speaking of the effect of the registration of deeds, he says:

"It is upon similar grounds that every man is presumed 'to be attentive to what passes in the courts of the State or 'sovereignty where he resides, and therefore a purchase 'made of property actually in litigation *pendente lite*, for a 'valuable consideration, and without any express or implied 'notice in point of fact, affects the purchaser in the same 'manner as if he had such notice; and he will accordingly 'be bound by the judgment or decree in the suit." (Citing a large number of authorities.)

Although the plaintiff is not a resident of the State of Wisconsin, yet it is substantially conceded that his rights as vendee of the Sheboygan and Fond du Lac Railroad Company must be determined by the adjudications of the courts of that State, and that it was the duty of the plain-

tiff, before purchasing, to inform himself of the action of the courts of Wisconsin. Had he done so, as the counsel supposes he did, he would have ascertained that a suit was then pending against his vendor, involving the validity of these orders, which would bind him as vendee; and if the decision in that suit was adverse to him, it would be *res adjudicata* in all courts in which he might seek to litigate the same question.

There is no rule of law better settled, than that the validity and construction of such contracts are governed wholly by the *lex loci*, and that a purchaser of them must look to the constitution and laws of the State of Wisconsin, as expounded and adjudged by the courts of that State, for their validity. And no greater evil, under our complex system of Government, could perhaps exist, than to have this court hold a rule of constitutional law, or of construction, as applicable to such contract, different and opposed to that established by the courts of Wisconsin.

It is most strenuously claimed that the Supreme Court of Wisconsin, prior to the decision of the case of Whiting *v.* The Sheboygen and Fond du Lac Railroad Company, "had, in repeated cases, declared all the principles neces-'sary to uphold the statute."

The learned counsel relies upon three cases to support this asseveration: Soens *v.* Racine, (10 Wis.;) Hasbrook *v.* Milwaukee, (13 Wis.,) which were both cases of taxation to build a harbor, and Broadhead *v.* Milwaukee, (19 Wis.,) which was a case of raising money to pay bounty to soldiers on enlisting in the army. The distinction between all of those cases and the one at bar is obvious. No one can for a moment doubt that the tax in all three of the cases was raised for a public purpose, and those decisions in no way have the slightest bearing upon the case at bar. This view was urged upon the Supreme Court of our State with the same zeal and confidence that it is relied upon here, but the

court, without doubt or hesitation, held that the question involved in this case had never been before it for adjudication.

It is also claimed that the cases in Wisconsin and other States, deciding that the right of eminent domain may be exercised in behalf of railroad companies for the purpose of condemning the right of way, decide in principle that taxation may be resorted to, to raise money to be donated to such companies; but there is a plain distinction between the power of eminent domain and that of taxation: the analogy existing between these powers is one of sound, more than of substance. It is said that property taken by the right of eminent domain must be taken for a public use, and that money taken by the power of taxation must be taken for public purposes, and that as the property of the citizen can be taken under neither, for a private use or purpose, it is concluded that the two powers rest upon the same principle, and are co-extensive; but I think it will be found, upon a more full examination of the principles involved, that the similitude is more apparent than real.

Property taken by taxation is taken as the individual's share of a public burden, which there is an equitable and legal obligation resting upon him, as a citizen, to discharge. This obligation is the correlative duty that arises from the benefits which his citizenship confers upon him. He is morally and equitably, as well as legally, bound to bear his proper share of every legitimate charge and burden which rests upon the Government to which he owes allegiance, as an equivalent for the protection to his rights which the Government affords.

But property taken by the power of eminent domain is not taken from the individual as any part of his share of a public charge or burden, but as something beyond what there is any duty or obligation resting upon him to contribute, and therefore full compensation is made to the person from whom property is taken by this power, and it is only taken from an individual when it *happens* that he is the owner of property which is required for the public use.

Its application to the property of any particular person is a matter of accident or chance; he then stands in the situation of a vendor, whether the title to the property taken passes to the Government or to a private corporation, and the only office which the power of eminent domain performs is to compel the individual to sell his property. Now, if the Government buys the property itself, a public charge or burden is created, and rests upon the Government to pay the consideration for it, and the power of taxation can be resorted to for the purpose of discharging the public burden thus created, because it is the duty of every citizen, the one from whom property is taken included, to contribute his proper share to discharge all public charges or burdens. But if the property is purchased for the benefit of an individual or private corporation, and the title of the property taken does not pass to the Government, no duty or obligation to pay the consideration rests upon the Government, and taxation cannot be resorted to, to raise money for that purpose, because in such case it would not be used to relieve the Government from a charge or burden which rested upon it, but it would be taxation for a private purpose, to wit: to discharge the burden or charge resting upon the individual or private corporation to whom the title of the property taken passed. So in the construction of a railroad, if the Government engages in building one for itself, a public charge or burden is created and rests upon the Government to pay for it; and money for that purpose can be raised by taxation, if it is conceded that the Government can rightfully engage in the work. But if an individual or a private corporation engages in the work of building a railroad, no duty or obligation can be said to rest upon the Government to pay for it, and taxation cannot be resorted to for that purpose, for the money would not in such case be raised to discharge a public burden or charge, but a private one, resting wholly upon the individual or private corporation engaged in the work, and because courts have decided that the public, *i. e.*, the citizens generally, in their individual capacity, have such use of a railroad, that they will uphold the exer-

cise of the power of eminent domain so far as to allow the Government to compel the owner of land, which is needed, to sell the right of way to the private corporations engaged in the work. It does not follow that taxation may be resorted to for the purpose of raising money to build the road, there being no duty or obligation resting on the Government to pay for building it; the essential element required to render taxation valid, to wit: a public burden or charge, is wanting. We are not required here to discuss the question, whether the courts have decided wisely or unwisely in sanctioning the exercise of the power of eminent domain to compel individuals to sell an easement in their property to individuals and private corporations engaged in certain kinds of business. We are only required to show that the two powers are distinct, and that it does not logically follow that in all cases where one can be rightfully exercised the other can also.

No case can be found, where it has been decided that anything beyond an easement in land can be taken under the power of eminent domain by a private corporation; that power has never been extended to the taking of personal property, much less money: and inasmuch as it is impossible to apply the power of taxation to the purpose of transfering, against the consent of the owner, an easement in land to a private corporation, the analogy between the two powers, from which our opponents claim so much, wholly fails. They must go further, and produce authorities which hold that they may seize the horses, wagons, iron, lumber, and money of the citizens under the power of eminent domain; and then there might be some show for claiming that it had been decided that money might be wrested from them by taxation for the benefit of private corporations. But even if such authorities could be produced, they would be far from conclusive, because the important distinction would still exist, that in taking any kind of property under the power of eminent domain, full compensation must be first made. While taxation, being a distinct branch of sovereign power, performing a different office for Govern-

ment, unless it could be also shown that a public burden was to be discharged by the money raised, taxation could not be resorted to.

This question comes at last to this, that the power of eminent domain and taxation are distinct powers, and proceed upon different principles, and require different conditions for their exercise, and it is wholly fallacious to say that because one may be exercised in behalf of a private corporation, the other may also. There is no necessary or proper connection in the conditions that will allow their exercise respectively.

The cases of taxation cited by our opponents are all cases where taxes were raised to discharge a burden or obligation resting on the Government. Brodhead *v.* Milwaukee was a case of raising money to pay soldiers for the defence of the nation; Soens *v.* Racine and Hasbrook *v.* Milwaukee were cases of building harbors, the title and control of which were in the Government; and Thomas *v.* Leland was the building of a canal owned by the State.

It would be almost ludicrous, if the consequences involved were not of the most serious character, that we are called upon to argue and elaborate the distinction which exists between the cases of raising money by taxation to build a railroad, which a county itself owns, and which is to be operated for its own benefit, and the building of one which a private corporation owns, and which is to be operated for the benefit of the stockholders.

This distinction comprises the fundamental principle upon which the right of private property rests. *It is* the right of private property. The difference between a municipal corporation owning a railroad, to be built with money raised by taxation, and a private corperation owning it, is the precise difference between raising money for a public purpose, and raising it for a private purpose. It is the distinction between *meum* and *tuum*. And when it has been stated, no argument can make it any stronger or more self-evident.

The learned counsel's syllogistic form of reasoning proves nothing, for the reason that his premises are erroneous.

The Supreme Court of Wisconsin has decided nothing in regard to the public *interest* in connection with the exercise of the power of eminent domain. The word *interest* is very comprehensive in its meaning, and the phrase "*public interest*," is not synonymous with "*public use*." The State has an *interest* in the tariff laws of England, and in the sugar crop of the West Indies, There is scarcely a business enterprise in the United States or out of it in which our State has not *some possible interest;* and this court has never anywhere intimated that the power of eminent domain can be exercised in favor of all objects in which *the public have some interest*. It has simply decided that it can only be exercised where the property is taken *for public use*. And if Mr. Carpenter intends to have it inferred that the power of eminent domain can be exercised in favor of all objects in which *the public have some interest*, the statement is evidently erroneous.

The proposition that the same court has held that "the power of taxation may be exercised in favor of *any object in which the public have the least possible interest*," is equally unfounded. No court on earth has ever held this doctrine, and none probably ever will.

The public have *some interest* in the smallest business enterprise that has ever been undertaken by the humblest citizen within the limits of the State. It is the prosperity of the citizens in their business enterprises that enables the State to collect revenue, and gives it consideration and power as a State. But absurdity can go no further than to claim that *the least possible interest* on the part of the public in the business undertakings of individuals will authorize the exercise of either the power of taxation, or of eminent domain in their favor.

If this court had really decided what Mr. Carpenter claims in Brodhead *v.* Milwaukee, it would most effectually end the argument in this case, and it would also end as effectually all distinction between the public use and the

private use of money raised by taxation. A tax for one purpose would be as valid as for another.

He insists, that it does not make the slightest difference whether "*the least possible interest*" about which he talks so much, is a direct interest, such as is conferred by the ownership and control of the work constructed, or an indirect and incidental interest, such as always attends the investment of money in any business; for almost every kind of business tends to increase the growth and promote the prosperity of the community in which it is carried on.

In every town are men who are liberal, enterprising, and public spirited. The possession of wealth by such men tends to promote the prosperity of the community in which they reside. They so use their money as to make the possession of it by them a public benefit. *Ergo*, says Mr. Carpenter, money can be raised by taxation and given to such men, for not only has "*the public the least possible interest*" in their having money, but it will derive a very plain and positive benefit from their use of it. Indeed, on the principle which he insists upon, a shoemaker or a tailor would have a stronger claim upon the public bounty than Mr. Carpenter's clients, for shoemakers and tailors manufacture articles that are an absolute public necessity, while the business of his clients is only a public convenience.

If this court can be induced to accept this doctrine, we shall have a principle worse than agrarianism in full blast in our State, and the time of future legislatures will be mainly occupied in dividing up the property of the people, by taking it under the power of taxation, and bestowing it upon such of our enterprising citizens and private corporations as will best use it to promote the growth and general prosperity of our State.

Perhaps nothing can be added to the conclusive reasoning of the Supreme Court of Michigan in *Ex rel.* Howell *v.* Town Board of Salem, (20 Mich., 452.) The leading opinion in this case is delivered by Cooley, Justice, who has acquired a national reputation for learning and ability as a constitutional lawyer. We print in full.

OPINION OF JUDGE COOLEY.

The People *ex rel.* the Detroit and Howell Railroad Company *v.* The Township Board of the Township of Salem.	Mandamus.

COOLEY, J.—The questions presented in this case are brought within somewhat narrow bounds, as its decision depends on very plain principles. It is admitted by every one that the validity of the action of the towns in voting aid and levying taxes depends entirely on the powers of the State to compel such action wherever it can permit it, and that no power can be delegated to the towns in excess of what can be exercised without delegation by legislative compulsion. The inquiry is reduced to the simple question, whether taxes can be imposed at the pleasure of the Legislature against the people of local municipalities, to furnish aid to railroad companies in carrying out their enterprises.

It cannot be claimed that there is no limit to the power of taxation which can prevent the imposition of all taxes for all purposes which the Legislature may choose. There are purposes the illegality of which would be so manifest that, although not mentioned in any constitution, no one could hesitate to say the burden was not validly imposed to further them. The purposes for which taxes are imposed must be public purposes, and however close some things may be to the dividing line, yet whenever any subject lies clearly on one side or the other, the courts must sustain or reject the tax accordingly, whether the purpose be laudable or not.

It has been said to be too clear to need argument, that it would be usurpation, and not legislation, to take the property of A and give it to B. It must be, on the same ground, equally illegal to tax A for the benefit of B; for the amount of property taken against his will cannot make any difference in the principle, neither can it make the wrong any less that he has companions in misery. Taxation for private purposes is no more legal than robbery for private purposes. And where an enterprise is conducted by private persons for their own private benefit, the public authorities, having no control over the expenditure, and no share in the profits, it is a private enterprise, and not a public one, whether large or small, and whether profitable or unprofitable. No enterprise can be properly regarded as a public

enterprise, in which the public has no voice. For the expenditure of public money the constitution and laws provide public officers, and put them under adequate control and security. The money of the people belongs in the custody of the agents of the people. Governments cannot delegate public responsibilities to private and irresponsible hands.

Unless railroad companies can be regarded as in some way representing the public, then they cannot stand before the law on any other footing than private citizens. So far as their business is concerned, they furnish on a large scale, and in a more perfect way, the same benefits which are extended to the population by other carriers, by land or by water, and benefits quite similar in principle to those conferred by enterprising hotel-keepers, millers, and others who find it to their profit to entertain all applicants impartially. They benefit the municipal corporation or the State in their corporate capacities in no way whatever beyond paying their taxes, for which they are presumed in law to get a full equivalent. They benefit the neighborhood, large or small, in the same way that all other business and enterprise aid it, by increasing population and stimulating commerce and industry. They do on a large scale what every industrious settler does on a smaller scale, and they do it just as every private person is supposed to conduct his affairs, primarily for his own benefit, and incidentally for any advantages that may follow or attend their private success to the benefit of others. There is nothing in the nature of their business which distinguishes them from any other persons, so as to make it in any legal sense a public undertaking.

It is said, however, that by the exercise of the right of eminent domain they are affected with a public character, and become invested with public functions.

If the exercise of this power is never valid, except on behalf of some public agency, then it might follow that it could not be used on behalf of these companies. It is reasoning in the wrong direction to determine the character of the beneficiary from the fact of its use. But it has been customary, from time immemorial, to allow lands to be taken for turnpikes and canals in the hands of private corporations, because the land could not otherwise, as a general thing, be obtained for the whole line. The fact that the work was one of general utility, and that no work of that description was possible without the exercise of this power, has created precedents which were readily applied to rail-

roads. They were always founded on necessity, and were the extreme application of a power which, in a much smaller degree, has frequently compelled private owners of property to submit to some obligations, whereby their neighborhood might be enabled the more securely and conveniently to use theirs. In some cities of England, by ancient custom, there were regulations concerning party-walls, drains, and the like, which rested on similar principles, and in some cases modern legislation has followed the same road. The courts, when railroads were first invented, recognizing the necessity, and endeavoring to find some plausible basis for it, carelessly said, that the railroads must be regarded as agents of the State, and in this apparently simple way solved the difficulty. But it was a mere figure of speech, and made them no more State agents than the decision that many things are lawful because devised by the Government as necessary to carry out some governmental power makes every one who avails himself of the privileges of the law a Government agent. Such a theory would make agents of pre-emptioners, and national bankers, and ocean captains, all of whom receive certain powers and privileges in order to further the policy of the United States, and some of whom have duties to perform as the conditions of their privileges, just as every citizen, in a smaller way, has certain duties laid upon him as a consideration for his legal rights. It might be difficult to trace out to any distinct and entirely satisfactory origin, in the theoretical system of human government, the propriety of allowing railroads to resort to compulsory means to obtain land for their tracks. But we perceive its necessity, and it has been provided by our constitution, under which we hold all our tenures, that railroads may be organized. We are not required, therefore, to trouble ourselves in accounting for what we must accept as the law of the land; and we certainly are not required to explain an anomaly by resorting to a manifest fiction, which would lead to the most dangerous results.

When land is taken for railroad purposes it costs the State nothing, and the owner is supposed to obtain its value from the company. The taxable community, therefore, can never be injured or burdened by the process. The persons engaged in the enterprise pay themselves for their own property and privileges, and if the burden falls heavily on any one else, it is on the private citizen, as land-owner, and not as tax-payer. When the company, therefore, has completed its road, the public has lost nothing, and has incurred

no responsibilities. Thenceforward the private corporation elects its own officers, appoints its own agents, makes its own regulations subject to the law, collects its own revenues, and, if the work pays, divides the profits among its stockholders. The public who travel are not a fixed or resident public, and must not be confounded with the political public represented by the authorities and controlling the taxation. The tax-paying community has no voice or interference in the management of the road, so long as the law is obeyed, any more than in any other private business. It is undertaken for private profit, and is in private and not in public hands. The company and its officers are agents of no one but the stockholders, and such legal obligations and privileges as they possess are attached to their business, as corresponding rights and duties attach under the law, and according to their nature to all kinds of private callings.

Taxation in their behalf is as essentially taxation for private purposes as it would be for any person or business whatever. If the Legislature can raise money by taxation to be spent by them for their great enterprise, it can do the same thing to enable any private citizen to become a producer of values for his own emolument. All industry helps general prosperity. No line can be found which can, in law, make one business more public than another. The power to resort to taxation to set men up in any business is a power that is foreign to the purposes of government. It is not legislative power, but unlimited sovereign will, that can compel one private citizen to furnish means to another. Taxation is only lawful to enable the Government to fulfill its public duties, and to pay such expenses as are incident to public business. There is necessarily a considerable dissension to determine what means may be desirable to enable the Government to do its work creditably, but a power to tax one citizen for the private emolument of another, upon any theory of mere incidental advantage to the general prosperity of large or small communities, can only rest on a foundation of absolute and irresponsible power to make favored classes and citizens, and make the whole body of tax-payers tributary to them. No such power can be tolerated in a republic, and no hint of such a power is to be found in our constitution. As far as it speaks at all on the subject, it prohibits State aid to private persons or enterprises, and if there is no specific prohibition of taxation for private purposes, it was on the same principle which left

out prohibitions against giving private property away to private persons: that is to say, the principle which renders it unnecessary to forbid powers which could not exist without clear and express grant.

For these reasons, and for those more fully expressed by my Brother Cooley, I think no *mandamus* should issue.

The act of 1864, under which the proceedings in question were taken, provides that it shall be lawful for each of the several townships in the counties of Livingston, Oakland, Washtenaw, and Wayne, to pledge their credit to aid in the construction of a railroad from some point near the city of Detroit to the village of Howell, for such sum or sums, not exceeding five per centum of the assessed valuation for the time being of the real and personal property in such township, as the electors of such township shall, at a meeting or meetings called for that purpose, determine. The electors, it is also provided, may, at such meeting or meetings, determine the terms, conditions, manner of executing the securities, and other particulars in regard to such pledge of credit, or they may empower some township officer or committee of electors to determine the same; and in case of no such determination or delegation of power to an officer or committee, then the several township boards of such townships are severally given power to determine all such particulars: *Provided*, That the amount of bonds that shall become due in any one year shall not exceed two per centum of the assessed valuation of such township at the time of issuing the same. The meeting of electors to decide upon such pledge is to be called by the supervisor on a request signed by thirty tax-paying electors, and upon ten days' public notice, and the securities issued or made in pursuance of the act are declared to be a valid charge upon the taxable property of the township issuing or making the same, and it is made the duty of the township board to provide by tax for the payment of the principal and interest thereon as fast as the same shall become due and payable by the terms thereof. But no bonds or other evidences of debt are to be delivered to the treasurer of any township, city, or village for any railroad company, until all the terms and conditions required by the vote of the township, or by the proper authorities, shall have been complied with: *Provided*, That no bonds, or other evidences of debt issued under the provisions of said act, or the moneys arising from the sale of the same, are to be delivered or paid over to the railroad company, until the ties shall be furnished and delivered on the

line of the road, and the road-bed thereof, including all bridges, culverts, cattle-guards, and road-crossings, shall be fully completed and ready for the iron, "within the limits of the municipalities rendering such aid." (*Laws of* 1864, *p.* 96.)

The act also provides for aid by the county of Livingston in its corporate capacity to the same line of road, and there are expressions in it which seem to imply an understanding on the part of the Legislature that they had conferred the like power on the city of Detroit; but the power is not given in express terms, nor is machinery provided for its exercise. And although "the several townships" in the counties named appear to be authorized to pledge their credit for the purpose specified, it would seem to be the intention of the Legislature to limit the right to such townships as might lie upon the line of any road which should be laid out and commenced, inasmuch as the securities or money are to be retained until certain progress has been made upon such road within the limits of the municipality rendering the aid.

Under this act it appears that the township of Salem voted aid to the extent of its assessed valuation; but the meeting at which the vote was taken was irregular for want of sufficient notice, and a special act of the Legislature was obtained to legalize the same. A condition was attached to the vote, which the railroad company has complied with, but the township board refuse to issue the securities voted, claiming that the act of 1866 was in excess of legislative authority, and therefore unconstitutional and void, and that the township vote was in consequence a nullity. The railroad company therefore apply for a writ of *mandamus* to compel the delivery of the securities, and an issue of law having been joined upon their application, we are required to consider the important constitutional question which the objection of the township board presents.

I suppose, if the legislative act in question can be sustained at all, it must be so sustained under the general authority of the State to prescribe and determine the objects to be provided for, fostered, or aided, through the expenditures of the public moneys. In other words, it must be regarded as an incipient step in the exercise of the sovereign power of taxation. This power, we are told, is not, and from its very nature cannot be, controlled and limited by precise and accurate rules, which shall designate and define in all cases the particular purposes for which alone moneys may be raised, or to which they may be appropriated when raised,

or the extent of the burden which may be imposed; and it is added, that upon all these points a broad and uncontrollable discretion is necessarily vested in the legislative department of every government.

It is conceded, nevertheless, that there are certain limitations upon this power, not prescribed in express terms by any constitutional provision, but inherent in the subject itself, which attend its exercise under all circumstances, and which are as inflexible and absolute in their restraints as if directly imposed in the most positive form of words. It is not doubted by any one that the power of the Legislature to determine for what purposes taxes shall be levied, and what districts of territory, and what classes of persons and property shall bear the burden, is very broad, and it must be confessed that in describing or defining it words are sometimes employed by the courts which import an absolute and unlimited discretion, such as might exist in an irresponsible government, or in the people, if acting in their sovereign capacity, without any written constitution, and which consequently could not be brought to the test of any restrictive rules. For many purposes these broad and loose definitions of the power of taxation are not objectionable, but they cannot be regarded as careful and precise enough to be tests of constitutional authority; and whenever they are employed in the law, the modifications by familiar constitutional principles are always to be understood.

I understand that in order to render valid a burden imposed by the legislature under an exercise of the power of taxation, the following requisites must appear:

1. It must be imposed for a public, and not for a mere private purpose. Taxation in a mode of raising revenues for public purposes only, and, as is said in some of the cases, where it is prostituted to objects in no way connected with the public interest or welfare, it ceases to be taxation, and becomes plunder. (Sharpless *v.* Mayor, etc., 21 Penn. St., 168; Grim *v.* Weisenberg School District, 57 Penn. St., 433; Broadhead *v.* Milwaukee, 9 Wis., 652.)

2. The tax must be laid according to some rule of apportionment; not arbitrarily or by caprice, but so that the burden may be made to fall with something like impartiality upon the persons or property upon which it justly and equitably should rest. A State burden is not to be imposed upon any territory smaller than the whole State, nor a county burden upon any territory smaller or greater than the county. Equality in the imposition of the burden is of

the very essence of the power itself, and though absolute equality and absolute justice are never attainable, the adoption of some rule tending to that end is indispensable. (Weeks *v.* Milwaukee, 10 Wis., 258; Ryerson *v.* Uttley, 16 Mich., 269; Merrick *v.* Amherst, 12 Allen, 504.

3. As a corollary from the preceding, if the tax is imposed upon one of the municipal subdivisions of the State only, the purpose must not only be a public purpose, as regards the people of that subdivision, but it must also be local, that is to say, the people of that municipality must have a special and peculiar interest in the object to be accomplished, which will make it just, proper, and equitable that they should bear the burden, rather than the State at large, or any more considerable portion of the State. (Wells *v.* Weston, 22 Mo., 285; Covington *v.* Southgate, 15 B. Monr., 491; Morford *v.* Unger, 8 Iowa, 82.)

The three principles here stated are fundamental maxims in the law of taxation. They inhere as conditions in the power to impose any taxes whatsoever, or to create any burden for which taxation is to provide; and it is only when they are observed that the legislative department is exercising an authority over this subject which it has received from the people, and only then is that supreme legislative discretion of which the authorities speak called into action. No discretionary power in that department is so absolute, and no judgment it can pronounce is so conclusive, as to preclude the citizen's contesting it whenever he believes his rights have been invaded by a disregard of any of these conditions. The duty of considering such a question is both unwelcome and undesirable, but it is not a duty which can be avoided, and we have no disposition to postpone its performance.

I propose first to inquire whether the purpose to be accomplished by the act in question is a *public* purpose, in the sense implied when burdens are to be imposed under the legislative power over the subject of taxation.

I do not understand that the word *public*, when employed in reference to this power, is to be construed or applied in any narrow or illiberal sense, or in any sense which would preclude the Legislature from taking broad views of State interest, necessity or policy, or from giving those views effect by means of the public revenues. Necessity alone is not the test by which the limits of State authority in this direction are to be defined but a wise statesmanship must look beyond the expenditures; which are absolutely needful to

the continued existence of organized government, and embrace others which may tend to make that subserve the general well being of society, and advance the present and prospective happiness and prosperity of the people. To erect the public buildings, to compensate the public officers, and to discharge the public debts, are not the sale purposes to which the public revenues may be applied; but, on the contrary, considerations of natural equity, gratitude, and charity are never out of place, when the general good of the whole people is in question, and may be kept in view in the imposition of the public burdens. The sovereign legislative authority must judge of the force of such considerations on a general view of the just and proper demands upon the public treasury, and of the ability of the people to provide for all; and when that authority determines that such payments will subserve the public good, the responsibility of the legislator for the correctness of his judgment must be to the people, whose representative he is, and upon whom the burdens he imposes must rest.

Nor has it ever been doubted that where the object of taxation was one of general interest to all parts of the State, it was competent for the State, instead of assuming the burden directly, and providing for it by means of a general State levy, to apportion it among the several counties and towns, and to authorize and require them to provide for it by local taxation. Our own State pursues this course invariably, as regards its general burdens; in this respect following what I understand to be the general system of the country, and the result demonstrates that it is practicable, wise, and expedient to make use of the local machinery as the best means of reaching all the people, without confusion and without exciting discontent. There is not only nothing in this course inconsistent with correct principles, but on the contrary it is in most perfect accord with other features of our governmental policy, the general purpose being to leave with the local communities in managing the public affairs which concern them the largest possible liberty of action which is consistent with the general public order and good government.

In the present case it appears that the object of the burden is not to raise money for a purpose of general State interest. Its object, on the contrary, is to create a demand which shall be a burden upon a small portion of the State only. On the ground of local benefit, a small district of the State is to be taxed to encourage a local enterprise, which it is

supposed will be of such peculiar local advantage, that this district, rather than the State at large, or any greater or smaller portion of the State, should contribute to its construction. The road, when constructed, is nevertheless to be exclusively private property, owned, controlled, and operated by a private corporation for the benefit of its own members, and to be subject to the supervision and control of the State only, as other private property is, with such few exceptions as the State, in granting the corporate powers, has stipulated for, in order to secure impartiality in the management of its business, and to prevent extortion. Primarily, therefore, the money, when raised, is to benefit a private corporation, to aid its funds and improve its property; and the benefit to the public is to be secondary and incidental, like that which springs from the building of a grist-mill, the establishment of a factory, the opening of a public inn, or from any other private enterprise which accommodates a local want, and tends to increase local values.

A railroad, however, it is said, is a public highway, and as such its construction is a public purpose, which may be accomplished through the instrumentality of the sovereign power of eminent domain, even when individuals, and not the State, are to own and control it. This argument is supposed to possess great force, and it therefore becomes our duty to examine it with some care. It is true that a railroad in the hands of a private corporation is often spoken of as a public highway, and that it has been recognized as so far a public object as to justify the appropriation of private property for its construction; but this fact does not conclusively determine the right to employ taxation in aid of the road in the like case. Reasoning by analogy from one of the sovereign powers of government to another is exceedingly liable to deceive and mislead. An object may be *public* in one sense, and for one purpose, when in a general sense, and for other purposes, it would be idle and misleading to apply the same term. All governmental powers exist for public purposes, but they are not necessary to be exercised under the same conditions of public interest. The sovereign police power which the State possesses is to be exercised only for the general public welfare, but it reaches to every person, to every kind of business, to every species of property within the commonwealth. The conduct of every individual, and the use of all property and all rights, is regulated by it, to any extent found necessary for

the preservation of the public order, and also for the protection of the private rights of one individual against encroachments by others. The sovereign power of taxation is employed in a great many cases where the power of eminent domain might be made more immediately efficient and available, if constitutional principles would suffer it to be resorted to; but each of these powers has its own peculiar and appropriate sphere, and the object which is *public* for the demands of one is not necessarily of a character to permit the exercise of another.

I have said that railroads are often spoken of as a species of public highway. They are such in the sense that they accommodate the public travel, and that they are regulated by laws with a view to preclude partiality in their accommodations. But their resemblance to the highways which belong to the public, which the people make and keep in repair, and which are open to the whole public to be used at will, and with such means of locomotion as taste, or pleasure, or convenience may dictate, is rather fanciful than otherwise, and has been made prominent, perhaps rather from the necessity of resorting to the right of eminent domain for their establishment than for any other reason. They are not, when in private hands, the *people's highways;* but they are private property, whose owners make it their business to transport persons and merchandise in their own carriages over their own land, for such pecuniary compensation as may be stipulated. These owners carry on, for their own benefit, a business which has, indeed, its public aspect, inasmuch as it accommodates a public want; and its establishment is consequently in a certain sense a public purpose. But it is not such a purpose in any other or different sense than would be the opening of a hotel, the establishment of a line of stages, or the putting in operation of a grist-mill, each of which may, under proper circumstances, be regarded as a local necessity, in which the local public may take an interest beyond what they would feel in other objects, for which the right to impose taxation would be unquestionable. The business of railroading in private hands is not to be distinguished in its legal characteristics from either of the other kinds of business here named, or from many others which might be mentioned; but in the case of Weeks *v.* Milwaukee, (10 Wis., 242,) the Supreme Court of Wisconsin justly treated with very little consideration the claim of a right to favor, under the power of taxation, the construc-

tion of a public hotel, though the aid was to be rendered expressly "in view of the great public benefit which the construction of the hotel would be to the city." The court expressly declared that the public could not be compelled to aid such an enterprise from any regard to the incidental benefits which the public were to receive therefrom.

The right of eminent domain is a vital right in every government, and must often be called into exercise when a special necessity demands that the private right in a particular piece of property shall give way for the public good. This right, it has been held, may be exercised on behalf of railways in the hands of private parties. But there can be no doubt, I think, that this holding was a considerable modification of common-law principles, though at the same time it must be admitted that it was on such strong grounds of necessity and policy, and in view of considerations so entirely new, as fully to excuse, and, indeed, to justify it. No principle was older, and none seemed better understood or more inflexible, than that one man's property could not be taken under the power of the Government and transferred to another against the will of the owner; but the State, nevertheless, is allowed to do so in the case of railroads, under the guise of a convenient fiction, which treats a corporation managing its own property, for its own profit, as merely a public convenience and agency. Nothing but an overriding public necessity could ever have led the courts to this judgment; for when the relations between the proprietors of a railroad and the public are examined, we perceive at once that the idea of an agency in a legal sense is inadmissible. They are public agents in the same sense that the proprietors of many other kinds of private business are, and not in any other or different sense. To illustrate this I might draw many exact parallels, but a single one will be sufficient for our purpose. The Michigan Central Railroad Company makes a business of transporting persons and property over its road for the benefit of its stockholders, but at rates which the State has regulated, and on the condition which the State has prescribed, of furnishing impartial accommodations. It does so, moreover, under a charter from the State, from which it derives its authority; and for this charter it has rendered or is supposed to have rendered a compensation. The hackmen of Detroit make a business of transporting persons and property over shorter routes, for their own profit, and in like manner at rates which the law regulates, and on the like

conditions of impartiality. To render the analogy closer, they are required to obtain a license from the public authorities to follow this calling, and for this license a fee is exacted. Like the railroad corporation, they supply a public want, and if the former can be called a public agency, the latter, it must be conceded, are entitled to stand in the same category.

If we examine the subject critically we shall find that the most important consideration in the case of eminent domain is the necessity of accomplishing some public good which is otherwise impracticable, and we shall also find that the law does not so much regard the means as the need. The power is much nearer akin to that of the public police than to that of taxation; it goes but a step farther, and that step is in the same direction. Every man has an abstract right to the exclusive use of his own property, for his own enjoyment, in such manner as he may choose; but if he should choose to create a nuisance upon it, or to do anything which would preclude a reasonable enjoyment of adjacent property, the law would interfere to impose restraints. He is said to own his private lot to the center of the earth, but he would not be allowed to excavate it indefinitely, lest his neighbor's lot should disappear in the excavation. The abstract right to make use of his own property in his own way is compelled to yield to the general comfort and protection of the community, and to a proper regard to relative rights in others. The situation of his property may even be such, that he is compelled to dispose of it, because the law will not suffer his regular business to be carried on upon it. A needful and lawful species of manufacture may so injuriously affect the health and comfort of the vicinity, that it cannot be tolerated in a densely settled neighborhood, and therefore the owner of a lot in that neighborhood will not be allowed to engage in that manufacture upon it, even though it be his regular and legitimate business. The butcher, in the vicinity of whose premises a village has grown up, finds himself compelled to remove his business elsewhere, because his right to make use of his lot as a place for the slaughter of cattle has become inconsistent with the superior right of the community to the enjoyment of pure air and the accompanying blessings and comforts. The owner of a lot within the fire limits of a city may be compelled to part with the property because he is unable to erect a brick or stone structure upon it, and the local regulations will not permit

one of wood. Eminent domain only recognizes and enforces the superior right of the community against the selfishness of individuals in a similar way. Every branch of needful industry has a right to exist, and the community has a right to demand that it be permitted to exist, and if for that purpose a peculiar locality already in possession of an individual is essential, the owner's right to undisturbed occupancy must yield to the superior interest of the public. A railroad cannot go around the farm of every unwilling person, and the business of transporting persons and property for long distances by rail, which has been found so essential to the general enjoyment and welfare, could never have existed, if it were in the power of any unwilling person to stop the road at his boundary, or to demand unreasonable terms as a condition of passing him. The law interferes in these cases, and regulates the relative rights of the owner and of the community, with as strict regard to justice and equity as the circumstances will permit. It does not deprive the owner of his property, but it compels him to dispose of so much of it as is essential on equitable terms. While, therefore, eminent domain establishes no industry, it so regulates the relative rights of all, that no individual shall have it in his power to preclude its establishment.

It is proper, however, to add the remark, even where the necessity is conceded, I do not understand that the right of eminent domain can be exercised on behalf of private parties or corporations, unless the State, in permitting it, reserves to itself a right to supervise and control the use by such regulations as shall insure to the public the benefit promised thereby, and as shall preclude the purpose which the public had in view in authorizing the appropriation being defeated by partiality or unreasonably selfish action on the part of those who, only on the ground of public convenience and welfare, have been suffered to make the appropriation.

In the case of Ladlee v. Langham, (34 Ala., 311,) it was held by the Supreme Court of Alabama that the right of eminent domain might be exercised on behalf of mills which ground grain for toll, and were compelled by law to render impartial service for all, when it could not be for other mills; and the distinction made is a very reasonable one. Except that the necessity is wanting, there would be the same justification for the condemnation of lands for stables for the public draymen of a city as for a way for a

railroad; the like power of regulating the use existing in each case, and the purpose in one being *public* in precisely the same sense as the other.

But when we examine the power of taxation with a view to ascertain the purposes for which burdens may be imposed upon the public, we perceive at once that necessity is not the governing consideration, and that in many cases it has little or nothing to do with the question presented. Certain objects must of necessity be provided for under this power, but in regard to innumerable other objects, for which the State imposes taxes upon its citizens, the question is always one of mere policy, and if the taxes are imposed, it is not because it is absolutely necessary that those objects should be accomplished, but because on the whole it is deemed best by the public authorities that they should be. On the other hand, certain things of absolute necessity to civilized society the State is precluded, either by express constitutional provisions or by necessary implication, from providing for at all, and they are left wholly to the fostering care of private enterprise and private liberality. We concede, for instance, that religion is essential, and that without it we should degenerate to barbarism and brutality; yet we prohibit the State from burdening the citizen with its support, and we content ourselves with recognizing and protecting its observance on secular grounds. Certain professions and occupations in life are also essential, but we have no authority to employ the public moneys to induce persons to enter them. The necessity may be pressing, and to supply it may be in a certain sense to accomplish a "public purpose," but it is not a purpose for which the power of taxation may be employed. The public necessity for an educated and skillful physician in some particular locality may be great and pressing, yet if the people should be taxed to hire one to locate there, the common voice would exclaim that the public moneys were being devoted to a *private* purpose. The opening of a new street in a city or village may be of trifling public importance as compared with the location within it of some new business of manufacture; but while the right to pay out the public funds for the one would be unquestionable, the other, by common consent, is classified as a private interest, which the public can aid as individuals if they see fit, while they are not permitted to employ the machinery of the Government to that end. Indeed, the opening of a new street in the outskirts of a city is generally very much more a mat-

ter of private interest than of public concern; so much so that the owner of the land voluntarily throws it open to the public without compensation; yet even in a case where the public authorities did not regard the street as of sufficient importance to induce their taking the necessary action to secure it, it would not be doubted that the moment they should consent to accept it as a gift, the street would at once become a public object and purpose, upon which the public funds might be expended, with no more restraints upon the action of the authorities in that particular, than if it was the most prominent and essential thoroughfare of the city.

By common consent, also, a large portion of the most urgent needs of society are regulated exclusively to the law of demand and supply. It is this in its natural operation, and without the interference of the Government, that gives us the proper proportion of tillers of the soil, artisans, manufacturers, merchants, and professional men, and that determines when and where they shall give to society the benefit of their particular services. However great the need in the direction of any particular calling, the interference of the Government is not tolerated, because, though it might be supplying a public want, it is considered as invading the domain that belongs exclusively to private inclination and enterprise. We perceive, therefore, that the term "public purpose," as employed to denote the objects for which taxes may be levied, has no relation to the urgency of the public need, or to the extent of the public benefit which is to follow. It is, on the other hand, merely *a term of classification, to distinguish the objects for which, according to settled usage, the Government is to provide, from those which, by the like usage, are left to private inclination, interest, or liberality.*

It creates a broad and manifest distinction—one in regard to which there need be neither doubt nor difficulty—between public works and private enterprises; between the public conveniences, which it is the business of government to provide, and those which private interest and competition will supply whenever the demand is sufficient. When we draw this line of distinction, we perceive immediately that the present case falls outside of it. It was at one time in this State deemed true policy that the government should supply railroad facilities to the traveling and commercial public, and while that policy prevailed the right of taxation for the purpose was unquestionable. Our

policy in that respect has changed; railroads are no longer public works, but private property; individuals, and not the State, own and control them for their own profit; the public may reap many and large benefits from them, and indeed are expected to do so, but only incidentally, and only as they might reap similar benefits from other modes of investing private capital. It is no longer recognized as proper or politic that the State should supply the means of locomotion by rail to the people, and this species of work is therefore remitted to the care of private enterprise, and cannot be aided by the public funds any more than any other private undertaking, which in like manner falls outside the line of distinction indicated.

In the course of the argument of this case allusion was made to the power of the State to pay bounties. But it is not in the power of the State, in my opinion, under the name of a bounty, or under any other covering or subterfuge, to furnish the capital to set private parties up in any kind of business, or to subsidize their business after they have entered upon it. A bounty law, of which this is the real nature, is void, whatever may be the pretense on which it may be enacted. The right to hold out pecuniary inducements to the faithful performance of public duty, in dangerous or responsible positions, stands upon a different footing altogether; nor have I any occasion to question the right to pay rewards for the destruction of wild beasts—a provision of this character being a mere police regulation. But the discrimination by the State between different classes of occupations, and the favoring of one at the expense of the rest, whether that one be farming or banking, merchandising or milling, printing or railroading, is not legitimate legislation, and is an invasion of that equality of right and privilege which is a maxim in State government. When the door is once opened to it, there is no line at which we can stop and say with confidence that thus far we may go with safety and propriety, but no farther. Every honest employment is honorable; it is beneficial to the public; it deserves encouragement. The more successful we can make it, the more does it generally subserve the public good. But it is not the business of the State to make discriminations in favor of one class against another, or in favor of one employment against another. The State can have no favorites. Its business is to protect the interests of all, and to give all the benefit of equal laws. It cannot compel an unwilling minority to submit

to taxation, in order that it may keep upon its feet any business that cannot stand alone. Moreover, it is not a weak interest only that can give plausible reasons for public aid. When the State once enters upon the business of subsidies, we shall not fail to discover that the strong and powerful interests are those most likely to control legislation, and that the weaker will be taxed to enhance the profits of the stronger. I shall not question the right of the people, by their constitution, to open the door to such discriminations; but in this State they have not adopted that policy, and they have not authorized any department of the government to adopt it for them.

It scarcely seems necessary to say, that what the State, as a political community, cannot do, it cannot require the inferior municipalities to do. When the case is found to stand entirely outside the domain of taxation, State burdens and township burdens are alike precluded: no township vote and no township majority, however large, can affect the principle; any single individual has a right to insist that the public do not own or control his property for the purpose of donations.

It may be proper to mention the maxim which is pressed upon our consideration, that the Legislature must pass upon the proper objects as well as the proper extent of taxation, not only in the case of the State at large, but in the case also of the several municipal corporations. Those corporations certainly have no inherent power of taxation, but take only so much as the State shall see fit to allow, and under such restrictions as the Legislature may think proper to impose. I shall concede also that they are not left to their option to exercise the power or to decline to exercise it; for as regards alike the general purposes of the State and those of a mere local concern, they are to tax as they are bidden, and may be compelled to obey the legislative will. The power of coercion and control is nevertheless to be exercised in view of and in subordination to those maxims of local self-government which pervade our whole system, and which preclude arbitrary and unaccustomed impositions, however desirable, in the opinion of the Legislature, the object to be attained may appear to be.

If the township of Salem can be required to tax itself in aid of the Detroit and Howell Railroad Company, it must be either, *first*, on the ground of the incidental local benefit in the enhancement of values; or, *second*, in consideration of the facilities which the road is to afford to the

township for travel and business. The first ground is wholly inadmissible. The incidental benefit which any enterprise may bring to the public has never been recognized as sufficient of itself to bring the object within the sphere of taxation. In the case of streets and similar public improvements, the benefits received by individuals have sometimes been accepted as a proper basis on which to apportion the burden; but in all such cases the power to tax is unquestionable, irrespective of the benefits. The question on such cases has not been of the right to tax, but of the proper basis of apportionment where the right was conceded.

The second ground is more plausible. To state the case in the form of a contract, it would stand thus: The township is to give or loan to the railroad company five per cent. of its assessed valuation. In consideration whereof the railroad company agrees to construct and operate their road, and to hold themselves ready at all times to give to the people of the township the facilities of travel and trade upon it, provided they will pay for such facilities the same rates which are to be charged to all other persons. In other words, the company agree, on being secured the sum mentioned, to take upon themselves the business of common carriers within the limits of the township.

If this consideration is sufficient in the case of common carriers, it must be sufficient also in the case of any other employment. There is nothing in the business of carrying goods and passengers which gives the person who conducts it a claim upon the public different in its nature from that of the manufacturer or the merchant. Neither is it of the least importance in a legal point of view that the carrier is usually a corporation, while the other kinds of business named are more commonly carried on by single individuals or partnerships. These are accidental circumstances, which may or may not exist in any particular case. But if the Legislature should pass an act providing that the township of Salem should give or loan a certain percentage of its taxable property to any merchant who will undertake to erect a store within the township, and hold himself ready at all times to sell goods therein to the people of the township on terms as favorable as those he would exact form others, he would be a bold man who should undertake to defend such legislation on constitutional principles. Yet the case would possess all the elements of public interest which are to be found in the case before us, the public convenience would be

subserved, and there would be a like tendency to increase local values. The difference in the cases would be in degree, and not in kind; and it would be easy to suggest enterprises as to which the comparison, even in degree, would not be to the advantage of the railroad. And when we have once determined that a municipal government can tax its citizens to make a donation to a railroad company, because of the incidental benefits expected from its operations, we do not go a single step further when we hold that it may use the public funds to erect a cotton or woollen factory, or a building suited to the manufacture of tobacco, and present it, on grounds of public benefit, to any person who will occupy it.

Such a case would not by any means be an extreme application of the principles contended for in the present proceeding. Newspapers are as much a public necessity as railroads. The city of Detroit contains several corporations which are carrying on the business of publishing such papers. Why should not the corporators, instead of furnishing from their own means the capital necessary to start themselves in business, have applied to the Legislature for an act authorizing the city to tax itself for that purpose? It is as difficult to make a success of a great newspaper as of a great railroad; the projectors do not more often make the business profitable to themselves; there are consequently all the same arguments to be advanced in favor of gratuities in their aid which are advanced here. We can go back to stage coaches as easily as we can dispense with the daily paper, which gives us the current news. It may be that, if this class of public benefactors were to be pensioned at the public expense, it would prove difficult for the Legislature to deal with the subject with entire impartiality; the political majority might regard those papers as useful and deserving of encouragement which inculcated their own political views; but this would hardly be a question of law; and if they saw fit to allow those townships and cities which were disposed to do so to vote aid to the party organs, the unwilling minority, who did not believe in the benefits to be derived from such organs, would be silenced by the decision we should render in favor of the present aid. The Legislature would have determined that the purpose was "public;" the need in order to put an establishment upon a successful footing, would generally be very apparent and pressing; the benefits expected would be great, especially to the majority party, and we are not

permitted to doubt that the local public, in very many cases, would sanction such legislation by voting the required aid. Newspapers are frequently started or aided by voluntary subscriptions, when a concerted effort on the part of the subscribers would be very likely to induce the local majority to shoulder the voluntary burden upon the public. The farmer, the merchant, the manufacturer, or the mechanic of the minority, who had been obliged when starting his own business to furnish his own capital, might think it unjust that he was now obliged to render compulsory aid in supplying the capital for the business of others; but the complaint would be unimportant, if the majority could be induced to acquiesce, and with the peculiar facilities which the favored interest possesses for the contest of the public sentiment, we cannot doubt that it would be quite as successful as the "public good" would require in securing legislative action and favorable local votes.

I have stated the case on behalf of the railroad as strongly as is possible, for I have assumed that the road is certain to be constructed, and to be operated afterwards, though the act in question makes no very effectual provision to that end, and the railroad company demand the bonds, without expecting to give any security that the township will ever receive the expected benefit from its expenditure. The opposition to this proceeding may be based, for aught we know, upon a conviction that the certificate cannot succeed, and that the money must consequently be wasted; but I prefer not to consider the case in any other light than that which is most favorable to the relator; and I shall therefore assume that the Legislature has established all possible safeguards against loss or disappointment, and that those safeguards would prove effectual. And regarding the case in that light, it rests, in my view, upon fallacies which are transparent, and upon doctrines which, followed to their legitimate results, will leave us wholly at sea as regards the objects of taxation, and will justify a resort to that measure for almost any private purpose which can be suggested. It is said, however, that there is an overwhelming weight of authority in support of this species of legislation. This statement is very often made with great emphasis, but without a foundation proportional to the energy with which it is repeated. There is indeed a considerable number of cases which, for diverse and irreconcilable reasons, have supported local taxation for objects of general interest, but many of these cases have not the least relevancy to the point

here contested. Such cases, for instance, as Thomas *v.* Leland (24 Ward, 65) and Merrick *v.* Amherst, (12 Allen, 504,) where local communities, on the ground of special local benefit, have been allowed or compelled to tax themselves in aid of the public works or buildings owned by the State, are not all analogous. Where the State itself is to receive the benefit of the taxation, in the increase of its public fund or the improvement of its public property, there can be no doubt of the public character of the purpose. Such of the other judicial decisions as are best reasoned rest plainly upon the doctrine, that the State, having within itself unlimited authority to aid works of internal improvement, may use its municipal bodies as its agencies for that purpose—a doctrine which is precluded by express provision in the constitution of this State. If we set aside these two classes of cases, very little real authority remains to support the doctrine contended for. The right to vote municipal aid to railroads has been vigorously disputed from the beginning, and many eminent jurists have always denied it. I regard with the utmost respect the courts which have preceded us in considering this question, but we should be willfully blind if we shut our eyes to the fact, that there have always been circumstances surrounding the consideration of this subject, which have not been favorable to a complete and unbiased expression of views. It is easy to follow an apparent authority, without stopping to question its soundness, when the popular desire is in the same direction; and upon this subject there are repeated decisions, which do not, by any new reasoning, or by any attempt to examine the subject or principle, add at all to the authority of those which preceded them. When cases follow in line for no better reason than because they have a case to follow, the authority is to be found in the first decision, and not by counting up the number in the line. The leading case upon the subject has been the Pennsylvania case of Sharpless *v.* Mayor, etc., (21 Penn. St., 147,) and we read the result, in the language of the same court, in a subsequent case: "We know," say the court, "the history of these municipal and county bonds; how the Legislature, yielding to popular excitement about railroads, authorized their issue; how grand jurors and county commissioners and city officers were moulded to the purposes of speculators; how recklessly railroad officers abused the overwrought confidence of the public; and what burdens of debt and taxation have resulted to the people. A moneyed security was thrown upon the

market by the paroxysm of the public mind.'' (Diamond *v.* Lawrence County, 37 Penn. St., 353.) The learned judges were quite too sanguine when they declared that the like could never happen again; but we are not concerned with their prophecy, so much as we are with their manifest conscientiousness, that those evils have come from a provision of the law. The best judgment of the legal profession, so far as I have been able to judge, has already been against the lawfulness of this species of railroad aid, and there has been a steady and persistent protest, which no popular clamor could silence, against the decisions which supported it. This protest has of late been growing stronger instead of fainter, and, if the recent decisions alone are regarded, the authority is clearly with the protest. But whether this is so or not, it is not of controlling authority here. We are embarrassed by no decisions of this State, and are at liberty, therefore, to consider this question on principle; and when the legal principle, which should govern a case, stands out in bold relief, it is manifestly more in accord with a proper discharge of judicial duty, that we should reach to it with directness, than that we should shut our eyes to the principle, and blindly follow where others have blindly led.

I have not deemed it important to consider any of the minor objections to this act, preferring, as I do, to deal with the main and fundamental infirmity. The case before us is that of a private corporation demanding a gratuity, which has been voted to it in township meeting, upon the assumption that its business operations and facilities will incidentally benefit the township. I do not find that the meeting possessed any inherent authority to pass such a vote, or that any such authority could have been conferred upon it. The Legislature could not confer upon the majority there convened a jurisdiction to measure for the minority the demands upon their gratitude or liberality. Individuals, as such, must make their own donations, and decide for themselves how far any proposed enterprise of other individuals can properly and justly, in view of the benefits they may receive therefrom, demand their aid and assistance.

As, therefore, it appears that the first and most fundamental maxim of taxation is violated by the act in question, it becomes superfluous to consider whether the act would also violate the act of apportionment, or be obnoxious in its application, because the burden, even if public, could not also be regarded as local and peculiar to this township. Equally superfluous is it to consider in detail the several

express provisions of the State constitution, which the respondents suppose to be violated. If the authority exercised is not within the taxing power of the State, it is quite needless to discuss whether, if it were within it, there are not restrictions which prohibit its exercise.

The *mandamus* applied for should, in my opinion, be denied.

OPINION OF JUDGE CHRISTIANCY.

The magnitude of the interests involved in this case has made me cautious in reaching a conclusion; and though the case was being fully and ably argued on both sides at an early period in the term, and I was strongly inclined to the opinion that the act in question was unconstitutional, I still had some doubts; and, with my views upon such question, to doubt would be to uphold the law. I was desirous of hearing further arguments, and the case has been re-argued, with such ability, thoroughness, and research as is seldom equaled; and without expressing any opinion upon other questions discussed, my doubts upon the main question in the case have been unsolved.

I concur fully in the opinion of my brother Cooley, and I concur also in that of the chief justice, so far as it relates to the power of the State, or any of its municipalities, to levy taxes for such merely incidental benefits as result from the building and operation of a railroad, or the prosecution of a private enterprise.

I am entirely satisfied such merely incidental public benefits cannot be made the basis of the right to raise taxes from the people, to be paid or loaned to a railroad corporation or other private parties for their own use, and without securing to the general or local public any greater interest in, benefit from, or control over the work or enterprise than would have accrued from it had the work been completed or carried on by the proprietors without such public aid.

My reasons for this conclusion have been so fully and ably presented by my brother Cooley, as to render it unnecessary for me to repeat them, and I will add but a single consideration, which I think of some importance, and upon which he has not touched.

The theory upon which this and other acts granting aid to railroad corporations have been passed, and upon which they are sought to be maintained, is this: that in this way railroad accommodations may be secured in localities where

but for such aid the roads would not be constructed at all, or until a later period; that experience has demonstrated that railroads expedite the settlement and improvement of the country through which they run, adding largely to the value of real estate, and promoting the prosperity of nearly all branches of business; that the aggregate of these incidental benefits, if estimated in money, would sometimes equal, if not exceed, the benefits which the company or its stockholders derive when in successful operation; in other words, that the stockholders reap but a part of the profit and advantage arising from the expenditure of their capital in the construction and operation of the road, while the public or the people, along and near the line, receive the balance. It is, therefore, supposed to be but reasonable and equitable that the latter should contribute a part of the expense of the work from which they derive such incidental benefits. This theory, at the first view, seems plausible and just. A little reflection, however, and a recurrence to the fundamental principles upon which corporations are created by the State, will readily demonstrate that this theory is unfounded upon any legal principle—a mere legal fallacy, and no more just than sound. These incidental benefits, which railroad corporations thus confer, by the construction and operation of the roads, are the only consideration or compensation which they pay, or which the public receive, for the large powers and exclusive privileges which the State has bestowed upon the corporations, beyond those enjoyed by the citizens of the State generally, including the exercise of the sovereign power of eminent domain, and which, but for those incidental benefits, would be wholly unjustifiable and highly injurious to the people of the State. No one can fail, upon a little reflection, to see that these incidental benefits constitute the sole inducement and only possible justification to the Government for the grant of such important and exclusive privileges.

This is a fundamental legal idea, upon which alone corporations are or can be created at all.

The corporation, therefore, in the reception and enjoyment of these large powers and privileges, must, upon all legal and constitutional principles, be considered as having received a full equivalent and compensation for those same incidental benefits which are now again urged as the basis of new and further compensation, as the foundation for the imposition of direct taxes, for the increase of those funds, when they could never have been in existence as corpora-

tions but for the virtual promise and reasonable expectation that such benefits were to be enjoyed by the people, without further compensation.

Such is one of the absurdities into which courts would be led, by elevating a mere incident into the place of its principal, a course of reasoning which, if applied to the constitution, would furnish a ready method for avoiding any constitutional restriction.

We do not deem extended comment upon the question, as to whether the principle of those cases, holding that a municipal corporation may subscribe for stock in a railroad company, covers this case, as necessary.

The difference between a county building, a railroad, or part of one, for itself, or for an individual or private corporation, is very broad.

States have frequently subscribed for stock in banks, and in such cases are held to stand on the footing of other private stockholders, (9 Wheat., 904,) but nobody has ever before dreamed that because a State or county might subscribe for stock in a bank, that would make all banks so far public corporations, or change the use of their property from a private use to a public one, as to give the Legislature the right to exact money from the people by taxation, to be donated to all banks, whether the State or county held stock in them or not; and no such consequence can, with reason, be claimed from the right of a State or county to subscribe for stock in a railroad company.

The fact that the right of private property has been so boldly, so persistently, and so arrogantly assailed in this case, is a pregnant sign of the evil times upon which we have fallen, and if the principle so boldly asserted should prevail, it would go far to obliterate the right of private property, which is one of the fundamental rights which are the foundation of civil society.

The argument, that a sufficient protection for the right of private property is afforded by the sense of justice, the

wisdom, and the virtue of legislative bodies, is proved by common experience to be utterly unfounded and fallacious. Almost every safeguard for the protection of private rights, found in the Constitution of the United States and of the several States, is leveled at legislative usurpation. Legislative bodies in the present age, as history shows they have not unfrequently been in the past, are notoriously corrupt. And we affirm, that no political society could be held together, if it were the established law, that a Legislature, under the form or pretense of taxation, could transfer, at pleasure, the private property of the citizens to individuals or private corporations.

If the power of taxation rightfully extends to a given case, all authorities are agreed that there is no limit to the extent to which it may be carried; it may even involve the entire destruction of the property taxed.

Take the case of the county of Fond du Lac. It has six of the 130 members in both branches of the Legislature. Those not representing that county have no pecuniary interest in such an act as the one in question, nor have their constituents. To say that the great majority of the members of the Legislature, whoin no sense represent the people of Fond du Lac county, in regard to a mere local act like this, affecting the people of that county only, can, by the passage of an act, transfer the entire property, or such part of it as they please, to this or any other railroad company passing through that county, is a proposition too monstrous to be entertained for a moment.

Let this court proclaim that the Legislature of the State has the constitutional power to fill the coffers of every private corporation, or even of all the railroad companies in the State, with money extorted form the people by taxation, and scenes of legislative corruption will be enacted which will cast the departures from the path of rectitude of former Legislatures, which are known to exist, into utter insignificance.

It is said that there is no express constitutional prohibition which prevents the exercise of this power by the Leg-

islature. That is true, and the reason is undoubtedly to be found in the fact, that no Government of any civilized country, however despotic, had ever claimed, or attempted to exercise, the right to take without compensation the property of one individual or class of individuals and give it to another. While history furnishes many examples of the rapacious and oppressive conduct of Governments in taking the property of the citizens for its own uses and purposes, none has ever attempted to invade the right of private property for the benefit of individuals and private corporations; hence we find express limitations of the power of the government to take the property of the citizen for its own uses in the constitutions of this country, but we find none which restrain the taking for the benefit of individuals or private corporations, either under the power of eminent domain or taxation. It was not conceived possible by the framers of our constitution that so monstrous an attempt would ever be made; but in these latter days of progress in ingenious and evil devices to obtain money without rendering a just equivalent for it, as well as progress in civilization, the attempt has sometimes been made, as this case shows; but whenever made, courts have everywhere held that no such power has been granted to the legislative branch of government, and that all acts having such an object in view are wholly void, as being entirely without the legislative power, and the prohibition is as imperative as though found in the express provisions of the constitution.

It is in considering and deciding questions of the nature presented by this case that courts rise to their highest condition of dignity and importance, as one of the co-ordinate branches of government, holding the sovereign power of a State. They are created as the last peaceable refuge of the citizen, to escape from the invasion and destruction of his highest rights—those of life, liberty and property—by the encroachments and usurpations of the other branches of government. And when courts shall fail to perform this,

one of their most exalted duties, of protecting the right of property of the citizen from the usurpations and corruption of the the Legislature, the only remedy left him is in violence and revolution.

J. M. GILLET, *Attorney.*
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16-699

16-699

SUPREME COURT OF THE UNITED STATES.

No. 11.—ORIGINAL.

EX PARTE: IN THE MATTER OF THE UNITED STATES, PETITIONERS.

PETITION FOR WRIT OF MANDAMUS OF THE JUDGES OF THE COURT OF CLAIMS.

FILED APRIL 5, 1872.

DEC 5 1872

Tallahassee, Fla.

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1 *Motion for mandamus.*

In the Supreme Court of the United States. December term, 1871.

And now comes the Attorney General, on behalf of the United States, and states that, heretofore, and previous to the sixth day of December, 1869, one John H. Russell commenced his suit in the Court of Claims of the United States, upon an alleged contract with the Government, in which issue was duly joined, and the cause duly tried, in accordance with the rules and practice of said court; and in which case, on the said sixth day of December, 1869, the said court rendered judgment in favor of said claimant for the sum of $41,355.33, Loring, J., dissenting. That, on the sixteenth day of February, 1870, an appeal to this court was allowed by said Court of Claims, and, on the first day of June, 1871, the Assistant Attorney General filed in said court a motion for a new trial in said cause, for the reasons stated in said motion, in pursuance of section two of the act of Congress, approved June 25, 1868, and at the same time filed new and additional material evidence that had come to the knowledge of the Assistant Attorney General since the rendition of said judgment, and which had not been introduced in or used on the trial of said cause.

That, on the eighteenth day of September, 1871, the Assistant Attorney General filed additional reasons for a new trial, with other material evidence that had come to his knowledge since the filing of the said motion for a new trial, which evidence had not been introduced in or used on the trial of said cause.

That, on the eleventh day of November, 1871, the said Assistant Attorney General filed another motion for an order of the court staying the payment of the judgment until the motion for a new trial should be decided.

That, on the twenty-first and twenty-second days of November, 1871, the said motions for a new trial and a stay of judgment were duly argued and submitted to the court.

That, on the eleventh day of December, 1871, and before a decision had been rendered by the court in said motions, or either of them, the said Assistant Attorney General filed another motion to remand the said motions to the law docket for a re-argument, which last motion was allowed by the court on the thirteenth day of December, 1871; and on the nineteenth of December the court ordered said motions to be replaced on the law docket for the month of January, 1872.

That, on the twenty-ninth of January, 1872, the said court rendered its decision on said motion for a new trial, dismissing the same for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court had been filed, affirming the judgment of the Court of Claims in the case, and also because two of the four judges be-

2 fore whom the motion was argued, and to whom it was submitted on the twenty-first of November as aforesaid, had theretofore rendered and filed their decision that the motion be denied upon the merits. All which facts will more fully appear by the certificate of the clerk of the said Court of Claims, already filed in this court, on a motion by claimant's counsel for a mandamus in said case, and to which reference is made.

And the Attorney General now moves the court here for an alternative writ of mandamus directed to the said Court of Claims, commanding said court to hear and decide said motions for a new trial, and for

stay of payment of judgment above referred to, or in default thereof to show cause to the contrary, at a time to be named by this court.

GEO. H. WILLIAMS,
Attorney General.
WILLIAM McMICHAEL,
Assistant Attorney General.

3 EX PARTE: IN THE MATTER OF THE United States, petitioner. } No. 11. Original.

In answer to the rule of the Supreme Court of the United States, in the above matter, made on the 22d day of April, 1872, requiring the judges of the Court of Claims to show cause, on Thursday, the 25th instant, why an alternative writ of mandamus should not issue, directing them to hear and decide certain motions for a new trial, and for stay of payment of judgment, in the case of John H. Russell, petitioner, vs. The United States, the undersigned, the chief justice and judges of said Court of Claims, respectfully submit to the Honorable the Supreme Court of the United States the following statement of the facts connected with the motions specified in said rule, and the action of the Court of Claims and the judges thereof in reference to the first-named of said motions:

On the first day of June, 1871, the Assistant Attorney General of the United States filed in the said Court of Claims, on behalf of the defendants, a motion for a new trial in the case of John H. Russell vs. The United States, and assigned as a ground for said motion that
4 fraud, wrong, and injustice had been done in the premises, in this: that for a part of the amount for which judgment had been rendered by this court in favor of said Russell, his receipt in full had been found in the office of the Third Auditor of the Treasury, which receipt had come to the knowledge of the Attorney General after the rendition of said judgment.

On the 18th of September, 1871, the Assistant Attorney General filed in the clerk's office of the court a specification of additional reasons for a new trial in support of the motion filed by him on the 1st of June, 1871, as aforesaid; one of which specifications indicated that, owing to a variance between the original depositions filed in the cause by the claimant and the printed copies thereof, upon which the judgment was rendered in favor of said Russell, the said judgment was largely in excess of the amount which the said Russell should have recovered, as appeared from the actual evidence in the case, which variance had come to the knowledge of the Attorney General after the rendition of said judgment in favor of said Russell; and the other of said specifications averred that it appeared, from original receipts on file in the office of the
5 Third Auditor of the Treasury, and from original reports on file in the office of the Quartermaster General, copies of which receipts and reports were filed with said specifications, that the steamer, "J. H. Russell," was not seized or impressed into the service of the United States, as alleged by said Russell, and as this court found, but was employed by the United States simply as a common carrier; and that the said Russell had been paid in full for the services of said boat during the time covered by the judgment; and that said receipts & reports first came to the knowledge of the Attorney General after the rendition of said judgment in favor of said Russell.

On the 22d of November, 1871, the said motion for a new trial having been argued on behalf of the defendants in support of it, and on behalf of the said Russell against it, before the court composed of Drake, chief justice, and Loring, Peck, and Nott, judges, was submitted to the court.

In conference thereon the said judges were equally divided in opinion; but the majority of them did not authorize any judgment to be entered in open court upon the motion; nor was any such judgment rendered.

On the 11th of December, 1871, while the said motion was still
6 pending in conference before the judges to whom it had been submitted, the Assistant Attorney General filed a motion in open court to remand the said motion for a new trial to the law docket for a re-argument; and on the 13th day of said month, it was ordered by the majority of the court that a re-argument of the motion for a new trial should be granted; whereupon Judges Peck and Nott dissented, and Judge Nott read in open court and placed on file the following opinion, giving reasons for their dissent:

"RUSSELL
"*vs.*
"THE UNITED STATES.

"PECK and NOTT, JJ.:

"The defendants' motion for a new trial in this case was argued before and submitted to four of the judges of this court for their decision. It was also stated on the argument by the counsel for the claimant, and conceded by the counsel for the defendants, that the Supreme Court had affirmed the judgment of this court. Subsequently, and while the motion was still under advisement, an oral suggestion was made by the Assistant Attorney General that the case be remanded and heard before a full bench, the only legal reason assigned being the decision of the Supreme Court affirming the judgment of this court. The counsel for the claimant objected, on the ground that the decision of the Supreme Court had been known and was announced on the hearing. The suggestion of the Attorney General was not a motion, according to the rules of the court, but it was subsequently reduced to writing and filed.

"We are of the opinion on these facts that the final judgment of this court, affirmed by the Supreme Court, is property which cannot be taken away except by proceedings in due form of law, and that it should be protected by the full discharge of our judicial duty; that the four judges who heard the motion, constitute a tribunal which can alone decide it, and that it is the right of the parties to have it decided by them; that the fifth member of the court, who did not hear it, and to whom it was not submitted, can take no part in its disposition; that the suggestion of the Assistant Attorney General presents no legal or just ground for ordering a re-argument; and that the defendants' motion for a new trial is unjust, inequitable, and contrary to the intent of both the statute and the common law, and it must be denied.

"We are also of the opinion that this decision, by a moiety of the four judges constituting the tribunal that heard the motion, and to which it was submitted, does, ipso facto, deny the motion, according to the constant and invariable practice of this court and of the Supreme Court; and that on its rendition an order should be entered by the court denying the motion."

On the 12th of December, 1871, the attorney of said Russell
7 produced in open court the mandate of the Supreme Court of the United States, affirming the judgment rendered by this court in favor of said Russell, and the same was ordered by this court to be placed on file.

On the 29th of January, 1872, the said motion for a new trial came up before a full bench of this court for re-argument, when a majority of the court decided, for the reasons stated in the following order entered

on the record of the court, that the said motion should be dismissed, the Chief Justice & Loring, judge, dissenting.

"JOHN H. RUSSELL
"*vs.*
"THE UNITED STATES.

"In this case it was ordered that the defendant's motion for a new trial be dismissed for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court has been filed affirming the judgment of the court in this case, and because two of the four judges before whom the motion was argued, and to whom it was submitted on the 21st of November, 1871, have heretofore rendered and filed their decision that the motion be denied upon the merits."

Since the making of this order no action has been taken by
8 this court in reference to said motion for a new trial.

The reasons assigned in said order against the jurisdiction of this court to hear and determine said motion, are the only cause which the majority of the court have to show why the alternative mandamus should not issue from the Supreme Court in this case.

In regard to the motion for stay of payment of judgment in the case of said Russell, which was filed by the Assistant Attorney General, on behalf of the defendants, on the 11th of November, 1871, the undersigned respectfully state that no action has at any time been taken by this court in relation thereto, and it is now on the files of this court undecided. It was a motion to stay payment of said judgment pending the said motion for a new trial, and the Assistant Attorney General has not heretofore called it up for hearing.

April 24, 1872.

C. D. DRAKE.
EDW'D G. LORING.
E. PECK.
CHARLES C. NOTT.
SAM. MILLIGAN.

(Indorsed: Ex parte: In the matter of the United States, petitioner. Answer of the judges of the Court of Claims.

9 And the undersigned for themselves give these additional reasons, against the rule; that the defendants by voluntarily arguing their appeal in the Supreme Court, after having made their several motions in the Court of Claims, which they did not proceed to argue in apt time, and by allowing the Supreme Court to proceed to judgment thereon while their motions in the Court of Claims were still pending, were guilty of experimenting upon the decisions of both courts, in a manner prejudicial to the ends of public justice; and that the course pursued by them in the Supreme Court while their motions in the Court of Claims were still pending, must be deemed a withdrawal of those motions from the latter court. And that it was against the course of justice for the defendants to subject the claimant to the expense and risk of a needless trial in the Supreme Court.

E. PECK.
CHARLES C. NOTT.

10 (Indorsement on cover:) Sup. C't U. S. 1871, Dec. term. No. 11. Orig'l. Ex parte: In the matter of the United States, petitioner. Answer of the judges of the Court of Claims to rule to show causes. Filed Ap'l 25th, 1872.

In the Supreme Court of the United States.

DECEMBER TERM, 1871.

JOHN H. RUSSELL
vs.
THE UNITED STATES.

MOTION FOR MANDAMUS.

IN THE SUPREME COURT OF THE UNITED STATES.

DECEMBER TERM, 1871.

MOTION FOR MANDAMUS.

And now comes the Attorney General on behalf of the United States, and states that, heretofore, and previous to the sixth day of December, 1869, one John H. Russell commenced his suit in the Court of Claims of the United States, upon an alleged contract with the Government, in which issue was duly joined, and the cause duly tried, in accordance with the rules and practice of said court; and in which case, on the said sixth day of December, 1869, the said court rendered judgment in favor of said claimant for the sum of $41,355 33, Loring, J. dissenting. That, on the sixteenth day of February, 1870, an appeal to this court was allowed by said Court of Claims, and, on the first day of June, 1871, the Assistant Attorney General filed in said court a motion for a new trial in said cause, for the reasons stated in said motion, in pursuance of section two of the act of Congress, approved June 25, 1868, and at the same time filed new and additional material evidence, that had come to the knowledge of the Assistant Attorney General since the rendition of said judgment, and which had not been introduced in or used on the trial of said cause.

That, on the eighteenth day of September, 1871, the Assistant Attorney General filed additional reasons for a new trial, with other material evidence that had come to his knowledge since the filing of the said motion for a new trial, which evidence had not been introduced in or used on the trial of said cause.

That, on the eleventh day of November, 1871, the said Assistant Attorney General filed another motion for an order of the court staying the payment of the judgment until the motion for a new trial should be decided.

That, on the twenty-first and twenty-second days of November, 1871, the said motions for a new trial and a stay of judgment were duly argued and submitted to the court.

That, on the eleventh day of December, 1871, and before a decision had been rendered by the court in said motions, or either of them, the said Assistant Attorney General filed another motion to remand the said motions to the law docket for a re-argument, which last motion was allowed by the court, on the thirteenth day of December, 1871; and on the nineteenth of December the court ordered said motions to be replaced on the law docket for the month of January, 1872.

That, on the twenty-ninth of January, 1872, the said court rendered its decision on said motion for a new trial, dismissing the same for want of jurisdiction, because, since the same was made, the mandate of the Supreme Court had been filed, affirming the judgment of the Court of Claims in the case, and also because two of the four judges before

whom the motion was argued, and to whom it was submitted on the twenty-first of November as aforesaid, had theretofore rendered and filed their decision that the motion be denied upon the merits. All which facts will more fully appear by the certificate of the clerk of the said Court of Claims, already filed in this court, on a motion by claimant's counsel for a mandamus in said case, and to which reference is made.

And the Attorney General now moves the court here for an alternative writ of mandamus directed to the said Court of Claims, commanding said court to hear and decide said motions for a new trial, and for stay of payment of judgment above referred to, or in default thereof to show cause to the contrary, at a time to be named by this court.

GEO. H. WILLIAMS,
Attorney General.
WILLIAM McMICHAEL,
Assistant Attorney General.